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IN THE

Supreme Court of The United States

October Term, 1981

No. _____

GRANT-OLIVER CORPORATION,
TRANS WORLD AIRLINES, INC., USAIR, INC., et al.,
Appellants

v.

MOON AREA SCHOOL DISTRICT,
Appellee

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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September 25, 1982

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QUESTIONS PRESENTED

1. Whether a School District's 15 percent patron parking tax which falls almost exclusively on interstate travelers who are non-residents of the School District and who receive no services or benefits from the School District is invalid because it imposes a constitutionally impermissible burden on the right to travel.

2. Whether the parking tax violates the Interstate Commerce Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution because the tax discriminates against interstate commerce and because the School District provides no services or benefits to non-resident parking patrons who are traveling in interstate commerce and who are almost exclusively the subject of the tax.

PARTIES TO THE PROCEEDING

James E. Tricco, James A. Divis, M. Ralph Mura, Robert M. Gunter, Mary Ellen Andrew, Lorraine F. McCarthy, Linda Puhala, Edward A. Ferrari, Louise Bertig, Janine R. Cater, Diane Pusateri, Ann Cantebury, Leo J. Eckerle, Michael Kontra, John Fiore, E. J. Magneuson, R. U. Moorman, Wayne Barr, M. D. Houser, A. S. Acri, Glenn Hardin, Henry Rougier, Rachella Palaio, Arthur Cox, Robert Biem, Charles Bower, G. Donald Hansbury, George E. Long, Charles Ebner, William C. Dowling, Grant-Oliver Corporation, USAir, Inc., and Trans World Airlines, Inc., Appellants,

The following corporations are subsidiaries of Trans World Airlines, Inc.:

Canteen Corporation, Century 21 Real Estate Corporation, Hilton International Co., and Spartan Food Systems, Inc.

Moon Area School District, Appellee.

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CITATIONS

CASES:

Complete Auto Transit v. Brady, 430 U.S. 274, 97 S. Ct. 1076, 51 L.Ed. 326 (1977) 5, 7, 8

Commonwealth Edison v. Montana, 453, U.S. 609, 101 S. Ct. 2946 (1982) 7, 8, 9

Crandall v. Nevada, 73 U.S. (6 Wall.) 35 18 L.Ed. 744 (1868) 6

Evansville-Vanderburgh Airport v. Delta Airlines, 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed. 2d 620 (1972) 5, 6, 7

State v. Cochise Airlines, 128 Ariz. 432, 626 P. 2d 596 (1980) 7

Wisconsin v. J. C. Penney Co., 311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. 267 (1940) 7, 8

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported at 446 A.2d 234 (1982). The opinion of the Commonwealth Court of Pennsylvania is reported at 428 A.2d 1028 (1981) and the opinion of the Court of Common Pleas of Allegheny County, Pennsylvania is reported at 127 P.L.J. 253 (1979). Each of the foregoing opinions is reproduced in full in the appendix hereto.

BASIS FOR JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on May 28, 1982. That judgment reversed the unanimous judgment of the Commonwealth Court of Pennsylvania affirming the Court of Common Pleas of Pennsylvania, which had held that a 15 percent patron parking tax imposed by the Moon Area School District was a constitutionally impermissible burden on the right to travel and on interstate commerce and was also violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

A notice of appeal to this Court was filed in the Supreme Court of Pennsylvania on August 5, 1982. On August 9, 1982, Mr. Justice Brennan entered an order extending until September 25, 1982, the time for docketing an appeal in this matter.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (2).

CONSTITUTIONAL PROVISIONS

United States Constitution Article I, Section 8, Clause 3.

> To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

Fourteenth Amendment to United States Constitution Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Moon Area School District Resolution 79-2 is reproduced in its entirety in Appendix F of this Jurisdictional Statement.

STATEMENT OF THE CASE

This is an appeal by Grant-Oliver Corporation, Trans World Airlines, Inc., USAir, Inc., 26 resident taxpayers of the Moon Area School District, and 4 non-resident taxpayers of the Moon Area School District. The appeal is from the judgment of the Supreme Court of Pennsylvania which reversed the unanimous judgment of the Commonwealth Court of Pennsylvania and upheld the constitutional validity of a 15 percent patron parking tax which was adopted by the Moon Area School District (the "School District") on March 26, 1979 and which was to be effective as of April 25, 1979.[1]

The tax falls with incidental exception, on parking patrons: who were traveling to and from the Greater Pittsburgh International Airport; who were not residents of the School District; and who were traveling in air commerce of which at least 88.5 percent was interstate and international air commerce. (App. 15a.)[2]

Specifically, the tax is a 15 percent patron parking tax on persons entering into parking transactions in commercial parking lots within the School District. There are six such commercial parking lots within the School District. The largest of these lots is located on property owned by Allegheny County, Pennsylvania within the boundaries of the Greater Pittsburgh International Airport and is operated by appellant, Grant-Oliver Corporation. The remaining five parking lots are adjacent to the Airport. Parking in these lots is a part of the flow of or

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1. The Commonwealth Court of Pennsylvania is an intermediate appellate court having jurisdiction of appeals over actions arising, inter alia, under local tax ordinances and resolutions. 42 Pa. C.S.A. §762.

2. "App." references are to the Appendix to the jurisdictional statement.

connected with interstate commerce and the parking lots are economically dependent upon the patronage of interstate travelers traveling to and from the Airport and in furtherance of air commerce. (App. 6a, 15a-16a.)

As noted in the recitals to the Tax Resolution, the receipts from the tax are to be used solely for the School District's general revenue purposes. The School District expends no funds for normal municipal services such as highway and road maintenance, police and fire protection and other similar services.[3] Rather, those services are provided by the Township in whose borders the parking lots lie. Thus, there was no evidence presented as to any benefit, other than the general availability of athletic facilities, that the School District confers on interstate travelers or parking patrons. (App. 28a-29a.)

The adoption of the tax was challenged by the appellants herein and others who filed a statutory appeal from the tax on April 16, 1979, pursuant to Section 6906 of Pennsylvania's Local Tax Enabling Act, Act. No. 511 of 1965, P.L. 1257, 53 Pa. Stat. Ann. Sec. 6901 et seq., in which they asserted the unconstitutionality of the tax.

The Court of Common Pleas held that the tax was invalid (1) because it would violate the Commerce Clause, Article 1, Sec. 8, cl. 3 of the United States Constitution and would impermissibly burden the right to travel interstate free of taxation; (2) because it would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Due Process Clause of the Pennsylvania Constitution;

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3. The Pennsylvania Supreme Court makes reference to the fact that the School District's athletic facilities are open to the general public. The School District submitted no evidence to show that any of these facilities were ever used by non-resident, interstate travelers.

and (3) because it would be excessive and unreasonable in violation of Section 6908(4) of the Local Tax Enabling Act, *supra*. Accordingly, the Court of Common Pleas enjoined the School District from enforcing the parking tax.

The School District appealed to the Commonwealth Court of Pennsylvania which affirmed the lower court's order in a unanimous opinion adopting as its own the opinion of the Court of Common Pleas.

The Pennsylvania Supreme Court reversed the holding that the tax does not violate the Commerce Clause or the Due Process Clause of the United States Constitution. Appellants timely filed with the Pennsylvania Supreme Court a Notice of Appeal to this Court.

THE QUESTIONS ARE SUBSTANTIAL

This case concerns the Constitutional validity of a tax which is aimed at and falls almost exclusively on non-residents of a School District who are traveling in interstate commerce and who receive no services, benefits or protection from the School District which imposes the tax. The Pennsylvania Supreme Court held that the tax does not violate either the Commerce Clause of the Constitution or the Due Process Clause of the Fourteenth Amendment to the Constitution. The holding that the tax does not impose a constitutionally impermissible burden on the right to travel and on interstate commerce, is in conflict with this Court's decision in *Evansville-Vanderburgh Airport v. Delta Airlines*, 405 U.S. 707 and with the well established principle that a tax cannot be aimed solely at those who receive no benefits from the taxing jurisdiction. See *Complete Auto Transit v. Brady*, 430 U.S. 274.

The Court of Common Pleas of Allegheny County and a unanimous Commonwealth Court of Pennsylvania recognized that this Court's decision in *Evansville* is controlling. Under the test set forth in *Evansville*, a tax imposed on persons traveling in interstate commerce will be sustained only if the tax is designed to make interstate travelers bear a fair share of the cost of providing the public facilities that further such travel. Furthermore, a tax on those traveling in interstate commerce will only be sustained if it is not "excessive in comparison with the governmental benefit conferred." 405 U.S. at 717. Accordingly, the lower Pennsylvania courts struck down the parking tax because the tax is a direct burden on persons traveling in interstate commerce and because the School District provides no facilities for and makes no contributions to aid in such travel. (App. 28a-29a.)

The importance of the right to travel without a burden of excessive taxation was recognized by this Court over a century ago in *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 where it held that a tax levied on each person leaving the state of Nevada by railroad, stage coach or other vehicle for hire impermissibly burdened the constitutionally protected right to travel *regardless of the amount of the tax.* Congress' concern that citizens be permitted to travel between states without being subject to taxation is reflected in Section 1113 of the Federal Aviation Act, 49 U.S.C. Sec. 1513 which prohibits states and political subdivisions thereof from levying or collecting "a tax, fee, head charge or other charge directly or *indirectly* on persons traveling in air commerce." (Emphasis supplied.) Congress was moved to adopt this provision because taxes such as those here and those allowed in *Evansville* "cut against the grain of the traditional American right to travel among the States *unburdened* by travel taxes." (Emphasis supplied.) Senate Report No. 93-12, 1973 U.S. Code Cong. & Adm. News

p. 1434, 1446. Accord, *State v. Cochise Airlines*, 128 Ariz. 432.[4]

Notwithstanding the long held views of Congress and the courts with respect to taxes on travel, the Pennsylvania Supreme Court reversed the lower courts and upheld the parking tax because it concluded that the tax is not a tax on the right to travel. The Pennsylvania court did not explain how it reached this conclusion, but it cannot be doubted that in reaching this conclusion it ignored the fact that the tax is aimed at and falls almost exclusively on non-residents of the School District. This is so because the only public parking lots in the School District are those which have an "interlocking" relationship with the Airport. (App. 6a, 15a.) Thus, regardless of the language in which the tax resolution is couched, as a practical matter, the tax is on those entering into air travel.

The Pennsylvania Supreme Court's holding also conflicts with this Court's holding in *Complete Auto Transit v. Brady*, 430 U.S. 274 and *Commonwealth Edison v. Montana*, 453 U.S. 609 and with the well-established constitutional principle that a tax must be reasonably related to the benefit conferred by a taxing jurisdiction in order not to be in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435.

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4. In *Evansville* the Court sustained a head tax on commercial airline passengers because the tax was fair compensation for services and facilities rendered to facilitate travel in interstate commerce. Section 1113 of the Federal Aviation Act was enacted in response to the decision in *Evansville*.

Complete Auto Transit set forth the test that a tax on interstate commerce, as opposed to interstate travel, must meet in order to pass constitutional muster. That test states that a tax will be constitutionally valid if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State." 430 U.S. at 279. This Court noted in *Commonwealth Edison* that the fourth prong of the test is akin to the test set forth in *Wisconsin v. J. C. Penney Co., supra*, "whether the state has given anything for which it can ask return." 101 S.Ct. at 2958.

The Pennsylvania Supreme Court held that the tax meets the fourth prong of the *Complete Auto Transit* test because the measure of the tax relates to taxpayer's presence or activities in the School District—that is the tax is a percentage of the fee charged for parking. It also stated that the Due Process test and the related test of Complete Auto Transit are met because:

> The activity of parking within the school district in order to have easy access to the airport, as well as the availability to the public of the school district's recreational facilities are more than sufficient personal benefits which concretize the necessary general benefit of participating in an orderly and civilized society.

In *Commonwealth Edison* this Court stated that when a tax is assessed in proportion to a taxpayer's activities "the taxpayer is shouldering its fair share of supporting the State's provision of police and fire protection, the benefit of a trained work force and 'the advantages of a civilized society.'" 101 S.Ct. at 2960.

The implicit assumption in the Pennsylvania Supreme Court's reasoning was that although the School District itself might not provide any services, benefits or protection to those who are subject to the tax, the Commonwealth of Pennsylvania has delegated to the School District the responsibility to provide for public education and has seen fit to delegate some portion of its taxing power.

The flaw in this reasoning is that the only taxing power which the State could delegate is the power to impose a general tax on all taxpayers. The State does not have the constitutional power to impose itself or to delegate the power to impose a tax which discriminates against interstate commerce or those who are traveling in interstate commerce.

Simply put Pennsylvania can not constitutionally delegate to a School District the authority to impose a tax falling almost exclusively on those persons traveling in interstate commerce, particularly when that tax bears no reasonable relationship to the benefits conferred by the School District. *Commonwealth Edition, supra.*

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing Jurisdictional Statement has been made on this __ day of September, 1982 by delivering three copies thereof to the offices of the following attorneys, who are counsel for all parties required to be served:

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APPENDIX

Appendix A

JAMES E. TRICCO, JAMES A. DIVIS, et al.,
Appellees,
v.
MOON AREA SCHOOL DISTRICT,
Appellant

Supreme Court of Pennsylvania.

Before ROBERTS, NIX, LARSEN, MCDERMOTT and HUTCHINSON, JJ.

Opinion

NIX, Justice.

The Moon Area School District (District) imposed a local tax on paid parking in the district. In this consolidated appeal[1], we are asked to consider whether 1) appellees have standing to prosecute the actions, 2) the tax violates the Commerce and Due Process Clauses of the United States Constitution and 3) such a tax is authorized under the Local Tax Enabling Act, Act No. 511 of 1965, as amended, 53 P.S. §6901 *et seq.* (the Act).

I.

On March 26, 1979 Moon Area School District pursuant to the Act enacted Resolution 79-2 which sets out a parking tax upon parking in all non-residential parking

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1. Jurisdiction to hear this appeal is conferred upon this Court by the Act of 1976, July 9, P.L. 586, No. 142, §2, as amended, 42 Pa.C.S.A. §724.

facilities located within the district for the purpose of raising revenues for the operation of the schools in the district. The resolution requires patrons to pay a tax at the rate of 15% of the consideration for each parking transaction. Operators of non-residential parking places are required to obtain a registration certificate at an annual cost of Ten ($10.00) Dollars, to collect the parking tax from patrons, keep chronological records of all transactions, and file monthly returns with the tax collector. Any operator's failure to comply with certain conditions subjects the operator to a monetary penalty that may equal 100% of the proper tax as well as penalty and interest. Criminal sanctions not to exceed $500.00, or upon default, imprisonment of less than thirty days are also provided.[2]

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2. The relevant sections of Resolution 79-2, Parking Tax Resolution, of the Moon Area School District provide:

> SECTION 3. IMPOSITION AND PAYMENT OF TAX: For the period of April 25, 1979 to June 30, 1979, and thereafter on the fiscal year basis of from each July 1 to each following June 30, a tax for general revenue purposes is hereby levied upon each and every patron for each and every parking transaction at the rate of 15 per centum (15%) on the consideration thereof. Every operator with each transaction shall add said tax to the consideration charged and shall obtain payment of said tax from the patron as a condition for the allowance of the parking or storing, and the fact of such allowance shall, and the fact of collection of the consideration shall conclusively presume the collection of the tax.
>
> SECTION 4. PARKING REGISTRATION CERTIFICATES:
>
> (a) On or after the effective date of this Resolution, it shall be unlawful for any person and/or any operator to conduct, continue to conduct, or thereafter begin to conduct any parking transaction with

reference to a non-residential parking place within the School District until or unless a Parking Registration Certificate or Certificates shall have been issued to said operator, and unless the tax imposed hereunder is accounted for in accordance with the provisions of this Resolution.

(b) Every person and/or operator desiring to continue to conduct or to begin to conduct any parking transaction, with reference to a non-residential parking place within the School District shall file annually an application for Parking Registration Certificate or Certificates for each parking place with the Collector. Every application for such Certificate or Certificates shall be made upon a form prescribed and furnished by the Collector, and authorized by the Board of School Directors of the School District. Such application shall set forth the name under which the applicant conducts such parking transactions, the location of the place of said parking place, the size and vehicle capacity of said parking place, and other such pertinent information as may be required by the Collector. If the applicant has or intends to have more than one place of such parking within the School District, the applicant shall state the required information with respect to each and every such place of parking. If the applicant is other than an individual, the names and addresses of the principal officers thereof, and any other reasonable information required by the Collector, shall be stated in the application. The application shall be signed and sworn to by the applicant. The Collector may require that the application be verified by oath or affirmation.

(c) Upon a proper application being made, the Collector shall charge a registration and certificate fee of Ten Dollars ($10.00) annually for each certificate which shall be paid by the applicant and the Collector shall grant and issue to such applicant a Parking Registration Certificate for each place of non-residential parking as set forth in the application. A Parking Registration Certificate shall not be assignable and shall be valid only for the person

and/or operator in whose name it is issued, and it shall be valid only for the conducting of non-residential parking at the place designated therein. Said Parking Registration Certificate shall at all times be conspicuously displayed at the place for which issued.

(d) The Collector may suspend, or after hearing, revoke a Parking Registration Certificate whenever the Collector finds that the holder thereof has failed to comply with any provision of this Resolution. Upon suspending or revoking any Parking Registration Certificate, the Collector shall request the holder thereof to surrender immediately all Parking Registration Certificates and duplicates thereof. Whenever the Collector suspends a Parking Registration Certificate, he shall notify the holder thereof immediately of such action and shall afford the holder a hearing, if one is desired and has not already been afforded. After such hearing, the Collector may either rescind his order of suspension, continue said suspension, or revoke the Registration Certificate or Certificates.

SECTION 5. RECORDS:

(a) Each operator shall maintain, separately with respect to each parking place, complete and accurate records of all transactions, of the total amount of consideration received from all transactions, and the total amount of tax collected on the basis of such consideration, and the same shall be done on a uniform daily basis. Each operator shall issue to the person paying the consideration such written evidence of the transaction as the Collector may prescribe by regulations.

(b) As to all transactions otherwise than on a unit per occurrence basis, the Operator shall make, have and keep segregated records of all such transactions, or if oral, then to do so by a record of relevant data as adequately describes each such transaction for calculation of the proper tax. Records shall be made at the time of the transactions. They shall be kept in chronological order.

(c) Each Operator shall afford the Collector and his designated agents and employees access to all such records and evidence at all reasonable times and shall provide verification of the same as the Collector may require. The Collector and his agents are hereby authorized at reasonable times and in reasonable manner to examine the books, papers and records of any operator in order to verify the accuracy of any return made.

(d) If no return has been made, or if a false return has been made, or if the operator's records are not properly made or kept, or if the operator of anyone under his control in any way obstructs an orderly audit or investigation relating to the determination of the proper tax due, then the Collector may make such assessment of what he reasonably determines to be the proper tax due, may add a liquidated damages assessment of up to one hundred per centum (100%) of the proper tax, and any fine as may be imposed under Section 9 shall be in addition to the liabilities hereunder.

SECTION 6. RETURNS AND PAYMENTS: Each Operator in collecting the tax (under Section 3) shall do so as the agent and trustee for the School District under the provisions and for the purposes hereof; and on the form prescribed by the Collector, shall file with him by the 15th day of each month, returns on all transactions of the Operator in the preceding calendar month. With such filing the Operator shall pay to the Collector all taxes due hereunder for such preceding month, such "taxes due" being the full tax that the Operator was charged hereunder to obtain from his patrons less two per centum (2%) thereof as compensation to the Operator for his services. Every Operator who fails to comply with the provisions hereof shall be deemed to have acknowledged his intentional failure of consideration and of his voluntary surrender of such compensation.

* * *

There are presently six non-residential parking operations which provide an approximate aggregate of six thousand one hundred fifth (6,150) parking spaces. A substantial number of these spaces are used by persons utilizing the Greater Pittsburgh International Airport as all of the parking lots are closely situate in the locale of the Airport.[3] Air traffic at the airport is both interstate and intrastate.

SECTION 8. COLLECTION AND PENALTY AND INTEREST:

All taxes, assessments, penalties and interests due from the Operators under this Resolution shall be paid to the Collector. Any Operator who fails to file a proper report as due or who fails to make proper payment as due, shall pay also a penalty of an additional ten per centum (10%) of the amount of the tax, and in addition, shall pay interest on the tax at the rate of one per centum (1%) per month or fraction thereof from the due date, the same being in addition to liabilities under Section 5(d) and Section 9.

SECTION 9. PENALTIES: Any person who violates any provision of this Resolution, or any regulation adopted pursuant to it shall, upon conviction thereof before any magistrate, be liable for a fine not to exceed more than Five Hundred Dollars ($500.00), or, in default thereof shall be imprisoned for a period not to exceed thirty (30) days. Each violation shall constitute a separate offense. Such penalties so imposed shall be in addition to all other liabilities otherwise imposed under any other of the provisions hereof, and shall be in addition to any other liability that may be applicable under any other provisions of law, civil, equity, and criminal.

3. The largest of the lots is at the airport and operated by a parking concessionaire-Grant-Oliver Corporation. The other five (5) lots are adjacent to the Airport. Grant-Oliver has a park-and-lock type of parking. The other parking is "valet" parking.

Challengers to the tax are residents of the school district, non-residents of the district, two airlines that service the airport and have an interest in the parking lot at the airport, operators of several of the lots, and the owner/lessors of the realty on which the parking concessions operate. These challengers filed appeals from the tax levy on April 6, 1979. On the same day, by order of then Judge John Flaherty, the appeals acted as a supersedeas until hearing which was held May 7, 1979.[4] The lower court declared the tax unconstitutional. The Commonwealth Court affirmed the lower court. The District petitioned for allowance of appeal from the decision of the Commonwealth Court in both cases to this Court. The petitions were granted and the appeals consolidated.

Appellant raised the questions of appellees standing to attack the validity of the tax through preliminary objections which were denied below. The essence of appellant's standing argument on appeal is that appellees did not allege specifically that they were "taxpayers" and "aggrieved parties," the standing requirements of the Act,[5] and that being subjected to the tax if appellees choose to park in one of the non-residential parking facilities is insufficient as a matter of law to establish standing. We find the arguments unpersuasive.

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4. By agreement of the parties, challenges to the continuation of the supersedeas and motion for a bond were withdrawn for a period extending until thirty (30) days after the trial court's decision on the merits. The challenges together with the bond question have been reasserted before this Court.

5. 53 P.S. §6906 provides in pertinent part: §6906. Appeals by taxpayers.

No tax levied for the first time by any political subdivision to which this applies shall go into effect until

The argument that appellees have not specifically alleged they are taxpayers and aggrieved is anachronistic. Hypertechnicality and formalism in pleading does not promote a prompt determination of the validity of the taxing resolution, as envisioned by the legislature in enacting Section 6 of the Act.[6] Further, such formalism is "a reversion to seventeenth century pleading"[7] contra the modern trend. *See, e.g., Lutz Print. v. Com. Dept. of Property*, 472 Pa. 28, 370 A.2d 1210 (1977); *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 169, 346 A.2d 269 (1975) (plurality opinion); Pa.R.Civ.P. 126; *Rosden v. Leuthold*, 274 F.2d 747, 750 (D.C. Cir. 1960) (purpose of Rules 15(b) and 54(c), Fed.R. Civ.P. is "to avoid the tyranny of formalism"). The employment or lack of employment of the terms "taxpayer" and "aggrieved" is not decisive. Rather, the question is

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thirty days from the time of the adoption of the ordinance or resolution levying the tax. Within said thirty days taxpayers representing twenty-five percent or more of the total valuation of real estate in the political subdivision as assessed for taxation purposes, or taxpayers of the political subdivision not less than twenty-five in number aggrieved by the ordinance or resolution shall have the right to appeal therefrom to the court of quarter sessions of the county upon giving bond with sufficient security in the amount of five hundred dollars ($500), approved by the court, to prosecute the appeal with effect and for the payment of costs. The petition shall set forth the objections to the tax and the facts in support of such objections, and shall be accompanied by the affidavit of at least five of the petitioners that the averments of the petition are true and the petition is not filed for the purpose of delay.

6. See note 5, *supra*.

7. This expression was used by Mr. Justice Frankfurter in *Yonkers v. U.S.*, 320 U.S. 685, 698, 64 S. Ct. 327, 334, 88 L.Ed. 400 (1944):

whether facts have been alleged which support the legal conclusion that they are taxpayers who are aggrieved.

An examination of the record including the pleadings indicate appellees are liable to pay or collect the tax and are, thus, aggrieved taxpayers.[8] The argument raising the insufficiency of the assertion that they are subjected to the tax if they elect to use the facilities attempts to interject a voluntary aspect into the inquiry. If such a concept were adopted in determining standing to object, it would effectively preclude objection to all sales and use taxes because the operating incidents of such taxes are voluntary.

As a corollary to this voluntary argument, appellants have also implicitly suggested that the appellees' challenge is premature. The argument of prematurity is particularly inappropriate in this case since under Section 6 of the Act, challenges to a tax imposed pursuant to the Act must be filed within the thirty (30) days following the adoption of the taxing ordinance or resolution, which thirty (30) days are a mandatory waiting period for the taxing authority. In other words, taxing authorities, when levying a tax for the first time,

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> Is not insistence on such empty formalism a reversion to seventeenth century pleading which required talismanic phrases, as for instance that a seller could not be held to warrant that he sold what he purported to sell unless the buyer pleaded warrantizando vendidit or barganizasset?

8. Allegheny Airlines (USAIR) and Trans-World Airlines are neither potential patrons nor operators of the non-residential parking lots. However, we need not reach the question of their standing. If the remaining appellees which number more than twenty-five (25) have standing, the appeal cannot be dismissed on the ground of standing.

must allow thirty (30) days for taxpayer appeals to be filed by prescribing an effective date at least thirty (30) days from the time of adoption of the taxing ordinance or resolution. If appellants were to succeed in their contention of prematurity, appeals not premature would be too late and no patron would be able to challenge the tax. All patrons able to file timely appeals from the tax are potential patrons. To hold that such persons do not have standing, which is absurd, contravenes the presumption "that the General Assembly does not intend a result that is absurd . . . or unreasonable." Statutory Construction Act, Act of December 6, 1972, P.L. 1339, No. 290, 1 Pa.C.S.A. §1922.

So, too, the tax-collection liability of the operators confers standing upon appellee/operators. *See, e.g., National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 97 S.Ct. 1386, 51 L.Ed.2d 631 (1977) (sole challenger of tax had only use-tax-collection liability and standing was assumed); *Wm. Penn Park., Inc. v. City of Pitts., supra*, (plurality opinion, no dissents) (tax collection liability of parking operators sufficient for standing). The owner/lessors are *persons* subjected to the taxing resolution as are the resident and non-resident appellees, and thus, have standing.

II.

Appellees contend that that the tax violates the Commerce Clause[9] of the Constitution of the United

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9. The Congress shall have Power

* * * * * *

To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes . . ."

U.S. Const., Art I, §8, cl. 3.

States. It is argued that the tax imposes an impermissible burden upon interstate commerce.

The threshold question is whether the courts need review this local state tax under the "negative implications" of the Commerce Clause. Judicial review of such taxes under the Commerce Clause is intended

> ...to ensure that States do not disrupt or burden interstate commerce when Congress' power remains unexercised: it protects the free flow of commerce, and thereby safeguards Congress' latent power from encroachment by the several States.
>
> *Merrion v. Jicarilla Apache Tribe*, [_____] U.S. [____, ____, 102 S.Ct. 894, 910] 71 L.Ed.2d 21, 40 (Slip opinion, filed January 25, 1982).

And "[c]ourts are final arbiters under the Commerce Clause only when Congress has not acted." *Merrion v. Jicarilla Apache Tribe, supra*, _____ U.S. at _____, 102 S.Ct. at 910, 71 L.Ed.2d at 40. See, e.g., *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 454, 99 S.Ct. 1813, 1824, 60 L.Ed2d 336 (1979); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 421-427, 66 S.Ct. 1142, 1150-53, 90 L.Ed 1342 (1946).

In this case, Congress has acted affirmatively when it expressly *prohibited* head taxes on persons traveling in air commerce and expressly *permitted* "sales or use taxes on the sale of goods or services." Pub. L. 85-726, Title XI, §1113, as added Pub.L. 93-44, §7(a), June 18, 1973, 87 Stat. 90, 49 U.S.C.A. §1513.[10]

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10. 1513. State taxation of air commerce
Prohibition; exemption

(a) No state (or political subdivision thereof, including the Commonwealth of Puerto Rico, the

Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; except that any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until December 31, 1973.

Permissible State taxes and fees

(b) Nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

If the tax here is a head tax, we need not look further for Congress has spoken. *Allegheny Airlines, Inc. v. City of Philadelphia*, 453 Pa. 181, 309 A.2d 157 (1973). Although appellees have argued that the tax in question here is a head tax, that position is clearly untenable. A head tax is a tax reckoned at a fixed amount for each head (person) in a designated class.[11] The tax here is not on the heads of "persons traveling in air commerce or on the carriage of persons traveling in air commerce." The operating incidence of the tax is the transaction of parking in non-residential parking lots (which are located at or near an airport). The tax is to be borne by the patrons of the non-residential parking operations. The measure of the tax is the consideration paid for the parking transaction. It is collected by the operator of the parking facility. It is not a tax on the right to travel and clearly Congress has not prohibited such a tax under 49 U.S.C.A. §1513.

But the permissability of sales or use taxes on the sale of goods or services in air commerce is not a congressional ratification of the specific tax in question here. Thus, judicial scrutiny of whether this tax violates the "negative implications" of the Commerce Clause is warranted.

We do not look to whether the tax attaches only to a "local" or intrastate activity to determine whether the tax is immune from Commerce Clause scrutiny. *See Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 350, 97 S. Ct. 2434, 2445, 53 L.Ed.2d 383 (1977);

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11. Black's Law Dictionary (5th ed. 1979), p. 648, defines "head money" as "a sum of money reckoned at a fixed amount for each head (person) in a designated class. Particularly (1) a capitation or poll tax."

Pike v. Bruce Church, Inc., 397 U.S. 137, 141-142, 90 S.Ct. 844, 846-47, 25 L.Ed.2d 174 (1970); *Nippert v. City of Richmond*, 327 U.S. 416, 423-424, 66 S.Ct. 586, 589-90, 90 L.Ed. 760 (1946). In reviewing a Commerce Clause challenge to this local tax, we focus upon "the practical effect of [the] challenged tax," *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 443, 100 S.Ct. 1223, 1234, 63 L.Ed.2d 510 (1980), to determine whether the tax substantially affects or is connected with interstate commerce.

Interstate commerce is not immune from state taxation.[12] To restate, the Supreme Court "has rejected the notion that state taxes levied on interstate commerce are *per se* invalid." *Commonwealth Edison Co. v. Montana, supra*, 453 U.S. at 615, 101 S.Ct. at 2952 *citing, Washington Revenue Dept. v. Association of Wash. Stevedoring Co.*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed. 2d 682 (1978); and *Complete Auto Transit v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). Yet, not all state taxation of interstate commerce is valid. It will be sustained, however, if it passes scrutiny under the four part test articulated in *Complete Auto Transit v. Brady, supra.* That test says a state tax does not offend the Commerce Clause if it "is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the state." 430 U.S. at 279, 97 S.Ct. at 1079.

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12. "Even interstate business must pay its way." *Western Live Stock Bureau v. Bureau of Revenue*, 303 U.S. 250, 254, 58 S.Ct. 546, 548, 82 L.Ed. 823 (1938); Postal Telegraph-Cable Co. v. Richmond, 249 U.S. 252, 259, 39 S.Ct. 265, 266, 63 L.Ed. 590 (1919).

Appellant posits that the tax is purely local in nature because the act of parking a car occurs prior to any interstate commerce. As previously stated, the local nature of the activity does not prevent Commerce Clause scrutiny. Because of the geographical location of the parking lots, at or near the airport, the commerce of the airport would be substantially impeded without the parking operations. There is a near interlocking relationship between the airport, the airline/appellees and the largest parking lot operator—Grant-Oliver Corporation. The record here indicates that the vast majority of patrons of the parking lots are traveling in air commerce. During 1977, 88.5 percent of the passengers flying to and from the airport flew to or from a point outside the Commonwealth of Pennsylvania. The remaining 11.5 percent of the passengers were intrastate passengers. The conclusion that the parking activity is a part of the flow of or connected with interstate commerce is inescapable.

Turning to the four-part test of *Complete Auto Transit v. Brady, supra,* we find no serious challenge by appellees to the first three prongs of the text. The only nexus of the activity or incidence of patrons' parking is within the District. There is no problem of apportionment or multiple taxation on the subject of the tax. Since patrons' parking at a non-residential parking lot in Moon Area School District is the legal incidence or subject of the tax, and it can occur in no other place, no other locality or state can tax the patrons' parking. The Moon Area Township's gross receipts parking tax is on the incidence of doing business measured by gross receipts, *Mellon Square Garage, Inc. v. Public Parking Authority of Pittsburgh,* 442 Pa. 229, 275 A.2d 654 (1941) and cannot support a claim of multiple taxation.

The claim that the tax discriminates against interstate commerce because the patrons bearing the tax are largely engaged in interstate commerce does not withstand examination. A similar argument in *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 251-253, 43 S.Ct. 83, 84, 67 L.Ed. 237 (1922) to the effect that Pennsylvania had "a virtual monopoly of anthracite coal and that, because 80% of the coal was shipped out of state, the tax discriminated against and impermissibly burdened interstate commerce . . . [was dismissed] as 'adventitious considerations.'" *Commonwealth Edison Co. v. Montana*, *supra*, 453 U.S. at 618, 101 S. Ct. at 2954. The tax burden in this case is borne according to the extent of use of the parking facilities and not on a distinction between patrons using interstate air commerce and patrons engaged in intrastate air commerce or local commerce.

The serious challenge to the tax is under the "fairly related" prong of the *Complete Auto Transit* test. It is repeatedly urged, and the lower court found, that there were no benefits afforded the patrons of the parking facilities by the District. The type of benefits found to be non-existent can be characterized as particular benefits afforded the patrons directly.[13] This is not the benefit or service requirement of the fourth prong of the *Complete Auto Transit* test. Under the fourth prong " 'the measure of the tax [must be] reasonably related to the taxpayers activities or presence in the state—from which it derives some benefit such as the substantial privilege of [the operating incidence]—the taxpayer will realize, in proportion to the taxes it pays, [t]he only benefit to

13. It was uncontroverted that the public may use the recreational facilities of the school district. The court below incorrectly ignored this fact in reaching its finding.

which it is constitutionally entitled . . . [:] that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes (citations omitted).' " *Commonwealth Edison Co. v. Montana, supra,* 453 U.S. at 628-29, 101 S.Ct. at 2960. Public education is a benefit of an organized society.

Nor is this a case such as *Nippert v. City of Richmond, supra,* which involved a local license and gross receipts tax to be born by interstate, itinerant drummers or salespersons whose activity of selling—the operating incidence of the tax—was not so regular, continuous or persistent in the taxing district as to constitute a "course of business."

The measure of the Moon Area School District tax is related to the taxpayers presence or activities in the district. The tax is assessed under a formula which relates the tax liability to the value of the patrons' parking within the district. Therefore, under *Commonwealth Edison Co. v. Montana, supra,* the fourth prong of the *Complete Auto Transit* test is met. We are satisfied that the Moon Area School District tax comports with the four requirements of the *Complete Auto Transit test.* We now turn to the Due Process Clause challenge to the parking tax.

III

Appellees vigorously argue again, as a corollary to the Commerce Clause argument, that the District provides no "benefits" in exchange for the tax, and as such violates the Due Process Clause of the Constitution of the United States. U.S. Const. amend. XIV, §1. A state's taxing power is subject to the constitutional restraints of the Fourteenth Amendment to the Constitution of the United States. And the test for determining whether

property has been taken without due process of law is:

> ... whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given *anything* for which it can ask return." [Emphasis added.]
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> *Wisconsin v. J. C. Penney*, 311 U.S. 435, 444, 61 S.Ct. 246, 249, 85 L.Ed. 267 (1940).[14]

Three years before *Wisconsin v. J. C. Penney, supra*, in *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 522, 57 S. Ct. 868, 878, 81 L.Ed. 1245 (1937) where infringement of the Due Process and Equal Protection Clauses of the Fourteenth Amendment by the Unemployment Compensation Act of Alabama was at issue the Supreme Court made quite clear that:

> "[t]he only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. 301 U.S. at 522, 57 S.Ct. at 878[15]

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14. In *Wisconsin v. J. C. Penney*, 311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. 267 (1940) the Supreme Court upheld the validity of a state tax on the privilege of declaring and receiving dividends out of income derived from property located and business transacted in the state, in the face of a Fourteenth Amendment challenge.

15. The fourth prong of the four part test of *Complete Auto Transit v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), for Commerce Clause scrutiny of state taxes, as refined in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981) is derivative of *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed. 1245 (1937),

In this case, the lower court and the Commonwealth Court found that there was no benefit afforded appellees. We do not agree. The question in the framework of this case is almost frivolous. The district provides public education for the children residing in the district. It borders on the trite but we note again that public education is an advantage of a civilized society. A corporation cannot object to paying school taxes. *Thomas v. Gay*, 169 U.S. 264, 280, 18 S.Ct. 340, 346, 42 L.Ed. 740 (1897). A taxpayer may not successfully object, on the ground of the "benefit" theory, to taxation for a general public use which includes taxes for schools. *Kelly v. City of Pittsburgh*, 104 U.S. 78, 26 L.Ed, 658 (1881). Appellees' argument is basically what this Court rejected in *Kelly v. City of Pittsburgh*, 85 Pa. 170, 179 (1877) when it stated:

> Now it may be true that the plaintiff is *not personally benefited by* either *the educational* or poor department of the city; but neither is any one not having children to educate, and not being himself a pauper. Yet, for such reason we are hardly prepared to stop the hand of the collector of school and poor rates. *He may not be personally benefited by the fire and police department; but the general municipality is largely benefited thereby, and his welfare is found in the prosperity of that municipality.* [Emphasis added.]

Wisconsin v. J. C. Penney Co., supra, General Motors Corp. v. Washington, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964) and *National Geographic Society v. California Board of Equalization*, 430 U. S. 551, 97 S.Ct. 1386, 51 L.Ed.2d 631 (1977). See, *Commonwealth Edison Co. v. Montana, supra*, 453 U.S. at 625 n. 14, 18, 101 S. Ct. at 2958 n. 14, 18.

The activity of parking within the school district in order to have easy access to the airport, as well as the availability to the public of the school district's recreational facilities are more than sufficient personal benefits which concretize the necessary general benefit of participating in an orderly and civilized society.

We see no reason to depart from these sound principles and thus find the tax does not offend the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

IV.

Appellees argue, and the lower court agreed, that the taxed transaction at the valet parking lots is a "retail sale" of a valet parking service which involves the transfer of possession of tangible personal property. It is urged that the amount of the tax exceeds the limit set by Section 8(4) of the Act, 53 P.S. §6908(4).[16] Appellees rely upon *Taylor v. Philadelphia Parking Authority*, 398 Pa. 9, 156 A.2d 525 (1959) and *Mellon Square Garage, Inc. v. Public Parking Authority of Pittsburgh*, 442 Pa. 229, 275 A.2d 654 (1971) as authority for their position. Their reliance is misplaced.

In attempting to apply Section 8(4) of the Act to the valet parking transactions primary emphasis has been

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16. 53 P.S.A. §6908. Limitations on rates of specific taxes

No taxes levied under the provisions of this act shall be levied by any political subdivision on the following subjects exceeding the rates specified in this section:

• • • • • •

(4) On retail sales involving the transfer of title or possession of tangible personal property, two per cent.

given improperly by appellees to the transference of possession of the vehicles. In order to show transference of possession or a bailment, *Taylor v. Philadelphia Parking Authority, supra*, is cited. That case held that when the owner of an automobile parked on a commercial parking lot retains control of that vehicle by keeping the keys to it, the nature of the arrangement between the proprietor of the lot and the car owner is one of a lease of parking privileges. The nature of the legal relationship was defined for the purpose of determining who assumes the risk of loss when a theft of contents of the parked automobile occurs. Mr. Justice McBride, speaking for the Court, commented, "The characterization of the relationship as a bailment or a lease... is based solely on whether the alleged bailor delivered the custody and control of the item to the bailee." 398 Pa. at 12, 156 A.2d at 527. But the categorization of the transaction as a bailment, and thus a transference of possession of property, does not aid in analysis here. The emphasis in Section 8(4) is upon "retail sale" primarily, and upon the transfer of title or possession of tangible personal property secondarily. The "retail sale" component of Section 8(4) is constricted by the modifying phrase "involving the transfer of title or possession of tangible personal property," not replaced by it. And since in bailment transactions the transference of possession is temporary, no ownership interest is transfered and the bailee's possession is on behalf of the bailor,[17] a bailment cannot meet this Court's essential element inherent in the defi-

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17. A bailment is defined as:

A delivery of goods or personal property, by one person to another, in trust for the execution of a special object upon or in relation to such goods, beneficial either to the bailor or bailee or both, and upon a contract, express or implied, to perform the trust and carry out

nition of a sales tax: a tax imposed upon a transaction whereby property is acquired. *Mellon Sq. G. Inc. v. Pub. P. Auth. of Pitts., supra; Blauner's, Inc. v. Philadelphia,* 330 Pa. 340, 198 A. 889, 892 (1938). Neither in our definition of a sales tax nor under Section 8(4) was the acquisition or possession of property intended to be a temporary one for the benefit of another. Further examination of the secondary consideration of transfer of possession is unnecessary. We hold there has been no sale when a valet parking transaction occurs.

Seeking further support of their proposition that the transaction is a sale, appellees cite dicta in *Mellon Sq. G. Inc. v. Public P. Auth. of Pitts., supra.*[18] The gratuitous statement in *Mellon* is not operative in this analysis and the advancement of it is a profound disservice to the fundamental soundness of the holding in that case.

When the patrons of valet parking pay the parking operators, they pay, not for the acquisition of property, but for the use of the parking lot and the valet service. Possession of the vehicle is temporarily transferred to the operator of the lot for the patrons benefit and is returned. This is not a "retail sale." The court below was in error in concluding that the tax upon valet parking transactions was controlled by Section 8(4) of the Act

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such object, and thereupon either to redeliver the goods to the bailor or otherwise dispose of the same in conformity with the purpose of the trust.

Black's Law Dictionary (5th ed. 1979) p. 129.

18. "If Mellon Square Garage were merely a collector of the tax from its patrons, its argument [that the tax was a sales tax] would be persuasive."

442 Pa. at 233, 275 A.2d at 657.

and the rate of the tax on valet parking need not be reduced to 2%.

A close reading of the record reveals that the agreement entered into by the District regarding no requirement of the posting of a bond by appellees pending appeal was operative for only thirty (30) days after the trial court's decision on the merits. Therefore, appellant is not prevented from raising the issue. However, the requirements of Section 6 of the Act, 53 P.S. §6306 provide for the posting of security in the amount of five hundred dollars ($500.00). A bond in this amount was posted by appellees. Additional security was not necessary as the tax moneys have been collected from the patrons and placed in escrow by the parking lot operators. (R. 449a).

Accordingly, the order of the Commonwealth Court affirming the order of the Court of Common Pleas of Allegheny County is reversed and the objections to the tax are dismissed.

ROBERTS and MCDERMOTT, JJ., concurred in the result.

FLAHERTY, J., did not participate in the consideration or decision of this case.

Appendix B

JAMES E. TRICCO et al.
v.
MOON AREA SCHOOL DISTRICT
Appeal of MOON AREA SCHOOL DISTRICT. APPELLANT.

COMMONWEALTH COURT OF PENNSYLVANIA.

Argued Nov. 18, 1980.
Decided April 30, 1981.

Before CRUMLISH, President Judge, and WILKINSON, ROGERS, BLATT, CRAIG, WILLIAMS and PALLADINO, JJ.

WILLIAMS, Judge.

This case comes before the Court on an appeal from the determination of the Court of Common Pleas of Allegheny County that a resolution passed by the Moon Area School District which imposed a fifteen per cent parking tax on users of the parking lots adjacent to the Greater Pittsburgh International Airport is unconstitutional. The lower court found the tax to be in derogation of the Commerce Clause of the United States Constitution and the Due Process Clauses of the United States and Pennsylvania Constitutions. It further held that it exceeded the limitations set by Section 8(4) of the Local Tax Enabling Act No. 115, Act of December 31, 1965, P.L. 1257, as *amended*, 53 P.S. §6908(4).

Having examined the record and relevant law, we hereby affirm and adopt as our own the able Opinion of Judge Narick, entered to No. S.A. 421-1979 below.

Order

AND NOW, the 30th day of April, 1981, the Order of the Court of Common Pleas of Allegheny County dated June 8, 1979 (No. S.A. 421-1979) is hereby affirmed.

WILKINSON, J., did not participate in the decision in this case.

Appendix C

TRICCO, ET AL.
v.
MOON AREA SCHOOL DISTRICT, ET AL.

No. SA398 and No. SA 421 of 1979. In the C.P. of Allegheny County, Civil Division.

Opinion and Order of Court

NARICK, J., June 8, 1979.—This is an appeal from the Resolution of the Moon Area School District (District) imposing a 15% parking tax on persons parking motor vehicles in parking lots at or adjacent to the Greater Pittsburgh International Airport (Airport). We dismissed the District's Preliminary Objections attacking the Petitioners' standing to appear as parties based on our finding that the Petitioners had a sufficient interest to confer standing under Section 6 of The Act. William Penn Parking Lot, Inc. v City of Pittsburgh, 464 Pa. 169, 346 A.2d 269 (1975) and cases cited therein. We find that the Resolution imposing the tax violates the Commerce Clause of the United States Constitution, the Due Process Clause of the Pennsylvania and United States Constitutions and the tax is excessive and unreasonable in violation of Section 8(4) of the Local Tax Enabling Act No. 511, Act of December 31, 1965, P.L. 1257, 53 P.S. §6908(4) herein referred to as The Act.

Based on the stipulations and evidence presented at the evidentiary hearing, arguments and briefs, we make the following findings:

RESOLUTION

The District, on March 26, 1979, pursuant to The Act, adopted Resolution No. 79-2 imposing the above tax for the following purposes:

> "Whereas, in recent years the cost of operating the Schools of the Moon Area School District has so increased that it is necessary to raise additional funds for the proper operation of said schools and for the furnishing of an adequate public education in said school district; and
>
> "Whereas, budgetary deficits are contemplated by said school district; and
>
> "Whereas, the law of the Commonwealth of Pennsylvania under Act No. 511 of 1965, and its amendments, known as the 'Local Tax Enabling Act' under the authority of which this resolution is enacted, have provided for the raising of school funds."

The Resolution requires the operators of the commercial parking lots to add the 15% tax to the consideration charged for parking and on the 15th day of each month to file a return with the collector of the District. Each operator of a parking lot is required to obtain a parking registration certificate and to pay a Ten Dollar annual fee for such certificate. The consideration for parking specifically shall not include the above-imposed tax. Each operator is the collector of the tax from each patron for the District.

PARTIES

The Petitioners in SA 398 of 1979 include 26 resident taxpayers of the District and four nonresidents that may become subject to the tax imposed by Resolution: Grant-Oliver Corporation (Grant Parking), which operates the

parking lots and valet concessions at the Airport; Allegheny Airlines; Trans World Airlines (airlines) who share in the revenues generated by the parking lot concession operated at the Airport by Grant Parking.

The Petitioners in SA 421 of 1979 are Airway Arms, Incorporated, d/b/a Airport Mobil Service (Mobil Parking), an operator for a parking lot within the District and whose patrons are subject to the tax herein; Greater Pittsburgh Service Corporation, d/b/a/ Airways Airport Parking (Airways Parking), operator of a parking lot within the District and whose patrons are subject to the above tax; Pittsburgh's Airport Motel, Incorporation (Airport Motel), an owner of land leased on a percentage-of-income basis to Airways Parking; J. C. Koch, a resident taxpayer and a patron of the parking lots within the School District and subject to the above tax; 23 nonresidents of the District, patrons of the parking lots within the District and subject to the above tax; and five nonresident-owners of land leased on a percentage-of-income basis to Airways Parking.

District and Moon Township

The District is made up of Crescent and Moon Townships with a population of approximately 23,000 and a student enrollment of approximately 4,959. The District imposes and collects Earned Income Tax from resident-employes within the District and Occupation Tax from persons employed within the District, whether residents or nonresidents. Moon Township (Township), the location of the Airport, imposes and collects real estate taxes from Airways Parking and Mobil Parking lot operators and collects a 10% gross receipts tax on their parking transactions at Airways Parking and Mobil Parking lots. The monies collected by the *Township* are ex-

pended for the normal municipal services, including highway and road maintenance, police and fire protection and similar services for its residents. The District, on the other hand, expends no money from its treasury for any of the above Township-related services.

Further, the taxed users of the parking lots herein, who with few exceptions are nonresidents of the District and are travelers in interstate commerce, do not receive and will not receive any benefits, services or protection from the District. The District Resolution is not and does not purport to be a police regulation of local aspects of interstate commerce to safeguard local interest. The receipts from the tax herein will be used solely for the District's general revenue purposes.

AIRPORT

The Airport is one of the major commercial airport facilities in the United States connecting the Greater Pittsburgh Metropolitan Area, either directly or indirectly, with other major airports within and without the United States. It is owned and operated by Allegheny County (County). In operating the Airport, the County provides services such as crash, fire and rescue, general maintenance and operation in clearing of runways and necessary utilities such as electricity, heat and water. It provides and pays for police, who are stationed at the Airport for security and traffic control purposes. The County's revenues consist of landing fees, field usage, office and hangar revenues and revenues from concessioners that operate shops and restaurants within the terminal buildings and parking lots.

There are nine major scheduled passenger airlines which serve the Airport in providing transportation for in excess of 80% of the persons engaged in interstate

commerce and international travel. The number of passengers serviced by the Airport during 1978 was 9,631,577; in 1977—8,739,491. All commercial airlines during the year 1977 scheduled 4,454,750 air passengers between Pittsburgh and other points in Pennsylvania, of which 3,943,520 passengers traveled in interstate commerce whereas 511,230 were intrastate commerce, or 11.5% of the overall interstate traveling passengers. The number of aircraft operations at the Airport, including landings and takeoffs, in 1978 was 336,366; in 1977—319,845.

The parties stipulated that a substantial number of the passengers departing from the Airport drive to the Airport in their personal cars and park at lots located on and off the Airport premises or use the courtesy or valet parking discussed below. Within an eight-day period, from April 24, 1979 through May 1, 1979, of the 1,005 patrons responding to a survey taken by Airways Parking, six were residents of the District and all but three persons were traveling in air commerce. One hundred fifty-three persons were nonresidents of Pennsylvania. In a survey conducted by Grant Parking, 509 parking patrons responded with only 12 of those patrons—or 2.3%—who were residents of the District. Further, 481 of the 509 were airline passengers on the day they were leaving the parking lot or had others in their car who had been airline passengers the day of the survey.

Parking Lots

There are six commercial parking lots within the District located adjacent to or in close proximity to the Airport. There are no nonresidential parking facilities located within Crescent Township. The County granted the operation of its County-owned parking lots and valet

parking concession to Grant Parking. Grant Parking, under its concession agreement with the County, pays the County a minimum of $3,000,000 per year, plus a substantial percentage of the gross revenue from parking and valet service receipts.

The 6,150 parking spaces at the parking lots involved herein, located within the District, are broken down as follows:

Grant Parking—5,465	Airport Arco—20
Airways Parking—940	Globe Wash—40
Mobil Parking—100	Allegheny Motor Inn—10 to 60

Grant Parking uses 1,800 of its 5,465 spaces for valet parking. Airways and Mobil Parking and Airport Arco are located approximately 1,200 feet from the Airport.

A patron of the parking facility operated by Airways Parking leaves his automobile in an area outside of the entrance to the office where he surrenders the keys to his automobile. Employees of Airways Parking drive a courtesy bus which transports the patron to the Airport. A ticket is given to the patron. The automobile is parked by employes or agents of Airways Parking and the keys are retained by the parking operator. Upon his return to Pittsburgh, the patron informs Airways Parking by telephone, and the courtesy bus returns to the Airport, picks up the patron, and drives him back to the parking lot. The automobile is brought to him by employes or agents of Airways Parking, and a consideration is paid for the valet parking at a current rate of four dollars per day. The parking rate reflects the entire charge for the valet parking service.

A patron of Mobil Parking drives his automobile to the parking facility where an agent or employe gets into

the vehicle and drives the patron to the Airport. The patron is given a ticket, and the employe or agent drives the automobile to the parking lot, parks the automobile and retains the key. When the patron returns to Pittsburgh, he informs Mobil Parking by telephone, and an agent or employe drives the patron's automobile to the Airport, picks up the patron, and returns him to the parking lot, where he pays the consideration for the valet parking at a current rate of four dollars per day, plus 15% tax or $.60. The parking rate reflects the entire charge for the valet parking service.

A patron seeking to use Grant Parking's valet service would drive his automobile to the Airport terminal where an employee gets into his vehicle and drives it to its valet parking lot. The patron is given a ticket and upon his return to Pittsburgh, he presents the ticket to an employee of Grant Parking, who removes the vehicle from the lot and delivers it to the patron, who pays the consideration of five dollars per day, plus a 15% tax or $.75.

The parking lots are economically dependent on the patronage of interstate travelers traveling to and from the Airport and in furtherance of air commerce. The parking facilities and transactions are an integral part and a link in the chain of interstate travel. The District provides no services or benefits to the travelers parking at the lots to facilitate the travel of the patrons of the parking lots nor does it contribute to the regulation of traffic or any other aspects of interstate commerce.

CONTENTIONS

The Petitioners challenge the imposition of the tax, contending as follows:

(1) Parking at the lots herein is a link and an integral part of travel in interstate commerce.

(2) The parking tax of the District is unlawful because it imposes a constitutionally impermissible burden on the right to travel by interstate commerce.

(3) The tax is unlawful because it provides for an arbitrary taking of property without compensation and due process clauses of the United States and Pennsylvania Constitutions.

(4) The tax imposed on transactions covered by Section 6908(4) of The Act involving business transactions of the transfer of title or possession of tangible personal property is excessive and unreasonable and, therefore, invalid or in the alternative, it should not exceed a rate of 2%.

(5) The Act does not authorize a District to require businesses located within the District to register and collect taxes imposed on individuals patronizing those businesses except in the case of an Earned Income Tax.

(6) The tax exceeds the authority granted to the District by The Act because of the provisions of the Resolution which require withholding and collecting of taxes at the source.

(7) The Resolution and tax is federally preempted by 49 USC §1513 as it is a tax, fee, head charge directly or indirectly levelled on persons traveling in air commerce or on the carriage of persons traveling in air commerce.

CONCLUSIONS

(1) It is appropriate to note, before considering pertinent decisions relating to Petitioners' first two contentions, that the tax is a violation of the Commerce Clause,

Article 1, §8 of the United States Constitution, the tax herein is imposed solely on the citizens, primarily nonresidents of the District, parking in lots at the Airport who, with few exceptions, travel by commercial airlines in interstate commerce. Further, the 15% tax which the travelers are asked to pay for parking does not contribute to or bear a fair share of the cost of providing facilities, services or benefits that further interstate commerce or that the tax will contribute to the operation or maintenance of the Airport and facilities related thereto, including the parking lots. It is not a gross receipts tax or a tax on the lot operators who are responsible only for collecting the 15% tax.

We start with the presumption that the tax herein passed pursuant to and under The Act is valid unless shown to be in violation of the Constitutions of the Commonwealth of Pennsylvania or the United States or applicable statutory law. Neither the parties nor our research have found any Pennsylvania appellate court decisions whether a tax on patrons of parking lots at or near airports constitute an impermissible burden on interstate commerce. Although our Supreme Court, in Allegheny Airlines, Inc., et al. v Philadelphia, 453 Pa. 181 (1973), was presented this constitutional contention involving a local airport $2.00 head tax on departing airline passengers, it did not consider that contention, basing its decision on the federal legislation pre-empting any state or local head tax at airports.

We believe the best decision on the power and limitations upon state tax in the area of interstate commerce is found in Freeman v Hewit, 329 U.S. 249, 91 L.Ed. 265(1946), which states as follows:

> "The power of the States to tax and the limitations upon that power imposed by the Commerce

Clause have necessitated a long, continuous process of judicial adjustment. The need for such adjustment is inherent in a federal government like ours, where the same transaction has aspects that may concern the interests and involve the authority of both the central government and the constituent States." (Footnote omitted.) p. 251.

"The history of this problem is spread over hundreds of volumes of our Reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts.

"Our starting point is clear. In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, *but by its own force created an area of trade free from interference by the States. In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.* Southern Pacific Co. v Arizona, 325 U.S. 761; Morgan v Virginia, 328 U.S. 373. In so deciding we reaffirmed, upon fullest consideration, the course of adjudication unbroken through the Nation's history. This limitation on State power, as the Morgan case so well illustrates, does not merely forbid a State to single out interstate commerce for hostile action. A *State is also precluded from taking any action which may fairly be deemed to have the effect of impending the free flow of trade between states. It is immaterial that local commerce*

is subjected to a similar encumbrance. It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables.

"These principles of limitation on State power apply to all State policy no matter what State interest gives rise to its legislation. A burden on interstate commerce is none the lighter and no less objectionable because it is imposed by a State under the taxing power rather than under manifestations of police power in the conventional sense. But, in the necessary accommodation between local needs and the overriding requirement of freedom for the national commerce, the incidence of a particular type of State action may throw the balance in support of the local need because interference with the national interest is remote or unsubstantial. A *police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests.* At least until Congress chooses to enact a nation-wide rule, the power will not be denied to the state. The Minnesota Rate Cases, 230 U.S. 352, 402 et seq.; S. C. Hwy. Dept. v Barnwell Bros., 303 U.S. 177; Union Brokerage Co. v Jensen, 322 U.S. 202, 209-12. *State taxation falling on interstate commerce, on the other hand, can only be justified as designed to make such commerce bear a FAIR SHARE of the cost of the local government whose protection it enjoys.* But revenue serves as well no matter what its source. To deny to a State a particular source of income because it taxes the very process of interstate commerce does not impose a crip-

pling limitation on a State's ability to carry on its local function. Moreover, the burden on interstate commerce involved in a direct tax upon it is inherently greater, certainly less uncertain in its consequences, than results from the usual police regulations. The power to tax is a dominant power over commerce. Because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a State of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce." (Emphasis added.) pp. 252-253.

• • •

"*An exaction by a State from interstate commerce falls not because of a proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce.*" (Emphasis added.) pp. 256-7.

Also pertinent and in substantial respects similar to the present case is Crandall v Nevada, 6 Wall 35, 18 L.Ed. 745 (1868). There the Court invalidated a Nevada statute that levied a "tax of one dollar upon every person leaving the State by any railroad, stage coach, or other vehicle engaged or employed in the business of transporting passengers for hire." The Court considered whether any tax of that character, whatever its amount, impermissible burdened the constitutionally-protected right of citizens to travel. In holding that it did, the Court reasoned:

"[I] f the State can tax a railroad passenger one dollar, it can tax him one thousand dollars. If one State can do this, so can every other State. And thus

> one or more States covering the only practicable routes of travel from the east to the west, or from the north to the south, may totally prevent or seriously burden all transportation of passengers from one part of the country to the other." 18 L.Ed. at 748.

In the Nevada case, (the charge —similar to the tax in the instant case) the travelers were not asked to bear a fair share of the cost of providing public facilities or services that further travel in interstate commerce. Thus the tax was charged without regard to whether Nevada provided any facilities or services for the passengers required to pay the tax. Cases decided since Crandall, including Evansville-Vanderburg Airport Authority v Delta Airlines, et al., 405 U.S. 707, 31 L.Ed. 620 (1972), have distinguished it on the ground and have sustained taxes designed to make interstate commerce bear a fair share of the cost of the local government whose protection it enjoys. Freeman v Hewit, supra; Henfrick v Maryland, 235 U.S. 610, 59 L.Ed. 385 (1915). In the latter case, a District of Columbia resident was convicted of driving in Maryland without paying a fee charged to help defray the costs of road construction and repair. He challenged his conviction on the ground that the fee burdened interstate commerce in violation of the rights of citizens to travel into and through the state. The Court rejected that argument, holding that:

> "[W]here a State at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor."

In Evansville-Vanderburg, supra, a local municipal head tax imposed on passengers departing the airport was sustained because they were necessary for the operation and maintenance of airport facilities. The Court stated:

> *"We therefore regard it as settled that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed on interstate and domestic users alike.* The principle that burdens on the right to travel are constitutional only if shown to be necessary to promote a compelling state interest has no application in this context . . . The facility provided at public expense aids rather than hinders the right to travel. A permissible charge to help defray the cost of the facility is therefore not a burden in the constitutional sense." (Emphasis added.) (Citation omitted.)

Unlike the tax before us, the Court found the head tax reflected a fair approximation for use of the facilities for whose benefit they were imposed. Significantly, in the instant case, there is no suggestion that the District's charges on the travelers in interstate commerce in fact advances the constitutionally-permissible objective of having interstate commerce bear a fair share of the cost to the District of the facilities relating to or aiding interstate air travel.

Since the Evansville-Vanderburg decision, supra, Congress enacted Section 1113 of the Federal Aviation Act, 49 U.S. Code §1513 prohibiting states and political divisions thereof from levying or collecting a "tax, fee, head charge or other charge directly or indirectly on persons traveling in air commerce." This Federal Act pre-empts local head taxes on those traveling in air commerce, which our Supreme Court relied upon in its Allegheny Airline decision, supra.

We now turn to (1) whether the Petitioners were engaged in interstate commerce and, if so, (2) whether

the Resolution and tax in question impose an impermissible burden on interstate commerce. The actual point in time and place at which interstate commerce actually commences and ceases has been the subject of discussion in many varied fact applications. Thus, in United States v Capital Transit Co., 338 U.S. 276, 94 L.Ed. 93 (1949), the Supreme Court found a motor carrier which operated buses and streetcars solely within the District of Columbia to be an integral part of an interstate movement. The Court reasoned that although the defendant's vehicles never left the confines of the District, the fact that a large portion of the passengers occupying those vehicles were government employes traveling to or from Federal offices across the Potomac River in Virginia, effectively operated to bring defendants within the stream of interstate commerce.

In a somewhat different context, a number of cases have been determined that activities involving parking facilities at an airport are interstate commerce. In Jackson v Airways Parking Co., 297 F. Supp. 1366 (N.D. Ga. 1969), the employe of a parking concessionaire, whose lots were adjacent to the Atlanta Municipal Airport, was found to be engaged in interstate commerce. The Court looked at numerous facets in rendering its decision, among them that the employer's lots were used by airline passengers who leave their cars in the lot before plane flights, many of which are interstate. The Court also found that the employer's lot was almost totally, if not completely, dependent upon the existence of the airport for its revenue. Thus, the geographic location, the interstate character of the lot patrons and the economic dependence on the airport all served to convince the Court that the lot and its employes were directly related to the ultimate interstate transaction—the flight.

In Park N'Fly of Texas, Inc. v City of Houston, 327 F. Supp. 910 (S.D. Texas 1971), the Court struck down a municipal ordinance which regulated the operation of a shuttle bus serving an airport parking lot. The Court stated when a number of the passengers departing by air from the City of Houston drive to the airport and park their cars in the airport parking lot:

> "Park N'Fly and Budget are directly and totally dependent economically upon the patronage of interstate travelers. Both are in close physical proximity to an interstate facility. And their clientele, with obvious and considered forethought, commence and end their interstate sojourns at plaintiff's and intervenor's parking lots, rather than at the air terminal. As a rule they are not concerned with just another local fare. Instead, their customers are almost exclusively bound for interstate travel." *Id.* at 921.

In United States v Yellow Cab Co., 332 U.S. 218, 90 L.Ed. 2010 (1947) although the Court found that cabs transporting purely local fares were not in interstate commerce, they held that a transfer concession operation of cab wholly within the city between railway stations and the city was interstate in nature. We believe the Yellow Cab case is distinguishable and not controlling in the instant case. The Court noted the following:

> "We must . . . mark the beginning and end of a particular kind of interstate commerce by its own practical consideration.
>
> "Here we believe that the common understanding is that a traveler intending to make an interstate rail journey begins his interstate movement when he boards the train at the station and that his journey ends when he disembarks at the station in the city of

> destination . . . From the standpoint of time and continuity, the taxi cab trip may be quite distinct and separate from the interstate journey. To the taxi cab driver, it is just another local fare."

However, the Court then went on to limit the applicability of the holding in that case:

> "We do not mean to establish an absolute rule that local taxi cab service to and from railroad stations is completely beyond the reach of federal power."

Further . . .

> "When persons or goods move from a point of origin in one state to a point of destination in another, the fact that part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character."

In the instant case, the parking which would be the subject of the tax is such an integral part of interstate commerce that it cannot be realistically separated from it and is not subject to tax. Michigan-Wisconsin Pipe Line Co. v Calvert, 347 U.S. 157, 166 (1954): "[A] tax imposed on local activity that is related to interstate commerce is valid if, and only if, the local activity is not such an integral part of interstate commerce that it cannot be realistically separated from it." The parking lots which serve the Airport are economically dependent upon the patronage of interstate travelers, the parking patrons—with few exceptions—commence and end their interstate travel at these parking lots rather than at the air terminal itself. Interstate travel would be significantly impeded without the availability of parking lots

and the parking by interstate travelers. The parking lots are within walking distance of the Airport. It would be exceedingly difficult to read the above cases, including the Yellow Cab case, supra, as holding that interstate commerce arbitrarily and absolutely ends at the air terminal. Under the circumstances present in this case, practicality and logic clearly dictate that parking activity is an integral part of interstate commerce and an important facet of the right to travel in interstate and thus cannot be subject to the tax herein. Accordingly, we find that the parking patrons at the Airport parking lots are an integral part of the interstate package. We also find that the Resolution and tax impose an impermissible burden on interstate commerce. From our analysis of the above cases, the Constitution does not prohibit a charge designed to make interstate or a domestic user of a locally-provided facility pay a reasonable fee to help defray the cost of maintaining or constructing that facility. In the instant case, the tax at issue is a direct burden on persons traveling in interstate commerce and in which the District provides no facilities for the persons required to pay it or any contribution to interstate travel. As noted in the facts above, the patrons subject to the tax are overwhelmingly engaged in interstate commerce and are nonresidents of the District. The District provides no services or facilities for the nonresident interstate travelers because there are none available. The practical operation of the Resolution and the tax directly burdens or effectively prevents the free flow of interstate commerce. As stated by the Court of Appeals for the Fifth Circuit, in Toye Bros., Yellow Cab Co. v Irby, 437 F.2d 806 (5th Cir. 1971):

> "Because state and local bodies have valid authority to prescribe regulations in many areas, the test of whether a particular state or local enactment con-

flicts with an exercise by Congress of its commerce powers entails ascertainment of whether the national interest in unfettered flow of interstate commerce outweighs local needs to protect public health, safety, welfare, or morals. Moreover, since conflicts with the commerce power are not always patent, it is often necessary for courts to determine whether a state or local enactment not facially in conflict is nonetheless (1) in application a discrimination against interstate commerce."

Contrary to the contention of the District, a tax having effects forbidden by the Commerce Clause will not be saved merely because it is encased in terms of bearing upon some "local incident." As stated by Justice Rutledge in his concurring opinion in the Freeman case, supra, at 267:

"As we then said, all interstate commerce takes place within the states and the consequences forbidden by the commerce clause cannot be achieved legally simply by the device of hooking the tax or other forbidden regulation to some selected 'local incident.' That such a factor may be chosen for bearing the 'direct' incidence of the tax may be a consideration to be taken into account in determining its validity. But it cannot validate a tax or regulation which produced the forbidden consequences, any more than a 'direct tax' which does not produce them can be outlawed because it is direct. Not 'directness' or 'immediacy' of incidence per se, whether 'upon the commerce itself' or upon a 'local incident,' is the outlawing factor, but whether the tax, regardless of the special point of incidence, has the consequences for interstate trade intended to be outlawed by the commerce clause."

In the Nippert v Richmond case, 327 U.S. 416 at 423, the Court stated:

"If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce."

The District's reliance on McGillick v City of Pittsburgh, 415 Pa. 581 (1964) is misplaced and distinguishable from the instant case. In that case the parking tax was imposed on all parking transactions within the City of Pittsburgh and whose transactions were local and not shown to be related to interstate commerce since it involved parking lots in the City of Pittsburgh approximately twelve miles from the Airport. Further, the Court recognized in citing a case, that even interstate commerce must pay its way but that the case before the trial court was a purely local transaction.

(2) Although not necessary to this Court's decision, since the Resolution has been found to violate the United States Constitution, two other contentions merit consideration. Petitioners contend that the District's 15% parking tax is violative of the Equal Protection and Due Process Clauses of the 14th Amendment of the United States Constitution and the Due Process Clause of the Pennsylvania Constitution since the said tax will provide no benefits to nonresident taxpayers and therefore amounts to an arbitrary taking of property without compensation.

The test to be applied in determining whether the tax herein violates the Due Process Clause of the Constitution is set forth in Wisconsin v J. C. Penney Co., 311 U.S. 435 (1945).

> "A state is free to pursue its own financial policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power *in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred* by the fact of being an orderly, civilized society." (Emphasis supplied.)

Thus, the test to be applied is:

> "[W]hether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is *whether the state has given anything for which it can ask return.*" (Emphasis supplied.)

The general applicability of the benefit theory has received reaffirment by the United States Supreme Court in Standard Pressed Steel Co. v Washington Department of Revenue, 419 U.S. 560, 561 (1975); Morton Salt Co. v City of South Hutchinson, 159 F.2d 897 (10th Cir. 1947); and U.S. Tobacco Co. v Commonwealth of Pennsylvania, 386 A.2d 471, 473 (1978) wherein Justice Manderino, writing for the majority of the Pennsylvania Supreme Court, stated the general proposition that:

> "A nexus must exist between the tax and activities within the state for which the tax is exacted, and 'the [controlling] question is whether the state has given anything for which it can ask return.' Standard Steel Co. v Washington Dep't. of Revenue, 419 U.S. 560, 562, 95 S.Ct. 706, 708, 42 L.Ed.2d 719, 722

(1975), citing Wisconsin v J. C. Penney Co., 311 U.S. 435, 444, 61 S.Ct. 246, 85 L.Ed. 267, 270-71 (1940)."

In American Airlines, Inc. v City of Saint Louis, 368 SW2d 161 (Mo. S.Ct. 1963), the Supreme Court of Missouri held that a statute authorizing a city to collect taxes based on the value of aircraft located for any time at an airport operated by the city situated outside of the city's corporate limits violated the Due Process Clauses of the Missouri and federal Constitutions. The court applied the "benefit theory", which it articulated as follows:

> "While the legislature is vested with the power to fix the situs of property for taxation, its action must not be an arbitrary one. The power is subject to the rule of uniformity 'and to the limitation that there must be some appreciable relation between the municipality exacting the tax and the person upon whom the burden is cast, either directly or by reference to the property taxed, from which there can reasonably be seen reciprocal duties to accord benefits on the one hand, and to respond therefor on the other . . . " *Id.* at 164.

The court found that while substantial services were provided by the city to the aircraft, and airline companies, in the form of protection from crashes and fire, rescue operations, maintenance and operation of runways, and provision of utilities; the cost of these services was defrayed from landing fees, usage charges, and rentals paid by the airlines pursuant to lease agreements negotiated with the city.

In the instant case, the District does not and cannot deny that it must confer some benefit upon those it taxes for the tax to be valid. The District contends primarily

that it does confer some direct benefit to nonresident parkers since the District's facilities are open to the public, which may be used by the guests of the motels at the parking lots who probably would be patrons of the parking lots located at the Airport. Also, it argues that since the Grant Parking lot is not subject to real estate tax, the District has suffered a loss of tax revenues while the general public receives a benefit in lower operating cost of the Airport. We are satisfied, under all the circumstances, that those persons subject to the tax, which includes near 100% of those parking at the parking lots herein, will receive no benefit in return from the District. Accordingly, we find in agreement with the contention of the Petitioners that the proposed tax is clearly unconstitutional.

(3) The Petitioners contend the tax is excessive and unreasonable and, therefore, it is invalid or, in the alternate, the tax should not exceed 2%. It relies on Section 8 (4) of the Act, 53 P.S. §6908 (4), the rationale of the concurring opinion of Judge Crumlish in Chwatek v Parks, 5 Pa. Commonwealth Ct. 414, 291 A.2d 333 (1972) and the William Penn case, supra. Section 8 (4) of the Act provides as follows:

> "No taxes levied under the provisions of this Act shall be levied by any political subdivision on the following subjects exceeding the rates specified in this section:"
>
> • • •
>
> "(4) On retail sales involving the transfer of title or possession of tangible personal property, two percent."

Judge Crumlish, in the Chwatek case, supra, indicated in his concurring opinion that a 10% gross receipt tax of

commercial parking lots is a bailment transaction. He stated:

> "[I] am compelled to comment on appellant's further argument that the transaction is a bailment and hence the transfer of possession of tangible personal property for a fee, upon which the Local Tax Enabling Act, 53 P.S. §6908 (4) limits taxation to two percent. The City's answer to this contention is that the tax is not on the bailment transactions but rather on the transfer of moneys in the form of gross receipts.
>
> "Obviously, the City believes that while individual bailment transactions are protected by the two percent limitation, the gross receipts of these transactions are not, even if all receipts of a business come from the bailment of personal property. I cannot agree with this interpretation and would therefore hold the tax is also invalid as it applies to the receipts from the bailment of personal property." *Id.* 291 A.2d at 335.

Neither the majority opinion of the Commonwealth Court nor the Pennsylvania Supreme Court (450 Pa. 62, 299 A.2d 631 (1972)) considered the bailment contention because it had not been raised in the trial court.

Under the William Penn case, the Court may declare a tax invalid if it exceeds the limit set forth in Section 17(a) of the Act. Further, that if a tax exceeds the limits of the rates in Section 8(4), the Court may reduce the tax. The Court also noted that because of the variety of taxes authorized by the Act, taxes that are not specifically set forth under Section 8(4), if sufficiently similar to a member of the class of cases referred to therein, the Court may look to the taxes in Section 8(4) in determining whether the rate is excessive.

The Petitioners claiming that the tax herein, if not within the "Generic" definition of retail sales, it is a bailment transaction and, therefore, similar to the limits set forth in Section 8(4); accordingly the tax should not exceed 2% if not otherwise found invalid as herein.

Airways Parking, Mobil Parking and Grant Parking clearly constitute bailment transactions. In Taylor v Philadelphia Parking Authority, 398 Pa. 9 (1959), the Supreme Court—considering a case of first impression on fixing liability on parking lot operators for loss by theft affirmed the trial court's decision that there was no bailor-bailee relationship but instead a lease of parking privileges and consequently no liability for loss by theft in the absence of culpable negligence. Thus in Taylor, supra, in discussing the classes of legal relationship in dealing with the present type of parking lots, stated:

> "[T]he first is where an owner rents space in a parking lot, drives his automobile therein, locks it or not as he chooses, and for all practical purposes retains control thereof. The second is where the garage attendants collect fees, assume control of cars, park them and move them about within the garage as they find convenient, the keys are left in the cars and tickets are issued as means of identifying cars upon redelivery. The first class of cases has almost universally been held to be that of a mere lease of parking privileges because the owner has paid a fee only for the privilege of parking his automobile without any actual delivery to the parking lot operator and with no corresponding right to redelivery . . ."
>
> "The second class of cases has been held to constitute a bailment and the lot owner held responsible for loss of the car or damage to it . . ." (Citations omitted.)

Accordingly, since the parking transaction is sufficiently similar to the permitted tax in Section 8(4), we find that the District's 15% tax is excessive and unreasonable and should be reduced to 2% at Airways Parking, Mobil Parking and the Grant Parking Valet lot.

We also consider for the purpose of taxes under Section 8(4) whether the tax herein is not a "sales or other similar tax." In Mellon Square Garage, Inc. v Public Parking Authority of Pittsburgh, 442 Pa. 223 (1971), the Court—in affirming the trial court's decision that the parking tax was not excludible from gross receipts under the terms of a lease, the Court considered whether for the purposes of computing rent under a lease between the parties a parking tax was a sales tax. The Court found that the tax more closely resembled a mercantile tax, a tax on the privilege of doing business and measured by the gross volume of business annually transacted. However, in discussing the distinction between taxes, the Court stated: "A sales tax is imposed upon a transaction whereby property is acquired. Usually the tax is on the purchaser, and the vendor acts as merely a collecting agent for the taxing authority." On the other hand, "A mercantile tax is a ... 'tax upon the privilege of transacting business measured by the gross volume of business annually transacted.' " (Citations omitted.) The Court concluded that the ordinance more closely resembled a tax on the privilege of doing business than one on the sales of parking space. However, it stated "If Mellon Square Garage were merely a collector of the tax from its patrons, its argument would be persuasive." A converse reading of the Court's holding indicates that the tax imposed on parking lots in the instant case would be classified as a sales tax. If the tax is a sales tax, it would

follow that the tax imposed would be limited to 2% as provided under Section 8(4) and we so find.

(4) We have carefully considered Petitioners' contentions (5), (6) and (7) and find they are without merit and, therefore, rejected. Relating to contention (7), the Federal Statute 47 U.S.C., Section 1513 has pre-empted any state or local intervention in the field of airport *head* taxes in response to the Evansville-Vanderburg decision. The legislation was not intended to pre-empt the parking tax herein.

We find and conclude that the Resolution and tax herein, challenged by the Petitioners for the reasons stated herein, are unconstitutional, void, invalid and unenforceable. Further, we find that the tax exceeds the limitation of Section 8(4) of the Act and, therefore, is excessive.

ORDER

AND NOW, to-wit, this 8th day of June 1979, upon consideration of the above Court's findings and conclusions, it is ORDERED, ADJUDGED and DECREED that the District's Resolution and tax are hereby found to be invalid in violation of the Commerce Clause of the U. S. Constitution, Due Process Clauses of the Pennsylvania and U. S. Constitutions and excessive in violation of Section 8(4) of The Act, 53 P.S. §6908(4). Further, it is hereby ORDERED that the District and their agents are enjoined from enforcing Resolution No. 79-2 against the Petitioners and all other present and future parking patrons at the Airport parking lots herein and Petitioners' parking lot operators.

BY THE COURT:
/s/ NARICK, J.

Order

AND NOW, to-wit, this 8th day of June 1979, upon consideration of the above Court's findings and conclusions, it is ORDERED, ADJUDGED and DECREED that the District's Resolution and tax are hereby found to be invalid in violation of the Commerce Clause of the U. S. Constitution, Due Process Clauses of the Pennsylvania and U. S. Constitutions and excessive in violation of Section 8(4) of The Act, 53 P.S. §6908(4). Further, it is hereby ORDERED that the District and their agents are enjoined from enforcing Resolution No.79-2 against the Petitioners and all other present and future parking patrons at the Airport parking lots herein and Petitioners' parking lot operators.

BY THE COURT:
/s/ NARICK, J.

Appendix D

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

JAMES E. TRICCO, JAMES A. DAVIS, M. RALPH GUNTER, MARY ELLEN ANDREW, LORRAINE F. MCCARTHY, LINDA PUHALA, EDWARD A. FERRARI, LOUISE BERTIC, JANINE R. CARTER, DIANE PUSATERI, ANN CANTEBURY, LEO J. ECKERLE, MICHAEL KONTRA, JOHN FIORE, E. J. MAGNEUSON, R. U. MOORMAN, WAYNE BARR, M. D. HOUSER, A. S. ACRI, GLENN HARDIN, HENRY ROUGIER, RACHELLA PALAIO, ARTHUR COX, ROBERT BIEM, CHARLES BOWER, C. DONALD HANSBURG, GEORGE E. LONG, CHARLES EBNER, WILLIAM C. DOWLING, GRANT-OLIVER CORPORATION, ALLEGHENY AIRLINES AND TRANS WORLD AIRLINES, v. MOON AREA SCHOOL DISTRICT	No. 81-1-67

Judgment

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Commonwealth Court , be, and the same is hereby reversed and the objections to the tax are dismissed.

BY THE COURT:
CARL RICE, Esquire
Prothonotary

Dated: May 28, 1982

Appendix E

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 81-1-67

GRANT OLIVER CORPORATION, TRANS WORLD AIRLINES, USAIR, et al.
Petitioners-Appellees,

v.

MOON AREA SCHOOL DISTRICT,
Appellant.

Notice of Appeal to the Supreme Court of The United States

Notice is hereby given that Grant-Oliver Corporation, Trans World Airlines, USAir, et al., Petitioners-Appellees, in the above captioned action, hereby appeal to the Supreme Court of the United States from the final judgment of this Court which was entered on May 28, 1982, reversing the judgment of the Commonwealth Court of Pennsylvania and dismissing Petitioners' objections to the patron parking tax imposed by Resolution 79-2 of the Moon Area School District.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

JEFFREY S. BLUM, Esquire
JOHN H. BINGLER, Esquire
THORP, REED & ARMSTRONG
2900 Grant Building
Pittsburgh, PA 15219
(412) 288-2558

CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing Notice of Appeal has been made on this 5th day of August, 1982 by delivering three copies thereof to the offices of the following attorneys, who are counsel for all parties required to be served:

JOHN A. ROBB, Esquire
1212 Frick Building
Pittsburgh, PA 15219

RICHARD H. MARTIN, Esquire
Frick Building, 10th Floor
Pittsburgh, PA 15219

Appendix F

Resolution No. 79-2

A Resolution of Moon Area School District Providing for the Levying and Assessing a Tax of Fifteen Per Centum (15%) Upon the Consideration Paid by the Patrons of a Non-Residential Parking Place for Each Parking Transaction, to be Collected from the Patron by the Operator of Each Such Non-Residential Parking Place; Requiring Parking Registration Certificate; Providing for the Levying and Collection of Such Tax; Prescribing the Requirements for Returns and Records; Conferring Powers and Duties Upon the Collector; and, Imposing Penalties.

Whereas, in recent years the cost of operating the schools of the Moon Area School District has so increased that it is necessary to raise additional funds for the proper operation of said schools and for the furnishing of an adequate public education in said school district; and,

Whereas, budgetary deficits are contemplated by said school district; and,

Whereas, the law of the Commonwealth of Pennsylvania under Act No. 511 of 1965, and its amendments, known as the "Local Tax Enabling Act", under the authority of which this Resolution is enacted, have provided for the raising of school funds.

Now, Therefore, the Board of School Directors of the Moon Area School District, Allegheny County, Pennsylvania, comprising the Townships of Moon and Crescent, hereby resolves as follows:

SECTION 1. NAME OF RESOLUTION: This Resolution shall be known as the "Parking Tax Resolution".

SECTION 2. DEFINITIONS: The following words and phrases when used in this Resolution shall have the meaning ascribed to them in this Section unless the context clearly indicates a different meaning:

(a) *"Collector"*—The person or persons appointed or elected by Resolution of the Board of School Directors of the School District, to collect all taxes imposed by this Resolution.

(b) *"Consideration"*—The payment or compensation of whatever nature, of whatever amount, and however stated or calculated, received by the operator from the patron, upon an express or implied contract, or under lease, or otherwise, whether or not separately stated, and whether paid in cash or credit to an account, for each parking or storing of a motor vehicle by a patron. The consideration shall not include the tax imposed and collected under this Resolution. Whenever the consideration is not fixed in a cash amount or in a stated and bona fide cash equivalent, the Collector shall make a reasonable determination of its cash value.

(c) *"Month"*—a calendar month.

(d) *"Non-Residential Parking Place"* or *"Parking Place"*—any place within the School District, whether wholly or partially enclosed or open, at which motor vehicles are parked or stored for any period of time in return for a consideration, not including: (i) any parking area or garage, to the extent that it is provided or leased to occupants of a residence on the same or other premises, for use only in connection with, and as accessory to, the occupancy of such residence, and (ii) any parking area or garage operated exclusively by an owner or

lessee of a hotel, motel, apartment hotel, tourist court or trailer park, to the extent that the parking area or garage is provided to guests or tenants of such hotel, motel, apartment hotel, tourist court, or trailer park for no additional consideration.

The term "Hotel" shall mean a building designed for occupancy primarily as the temporary abiding place of individuals who are lodged with or without meals.

The term "Motel" shall mean a building designed for occupancy primarily as the temporary abiding place of individuals who are lodged with or without meals, and which is customarily designated as a motel.

The term "Motor Vehicle" or "Vehicle" shall include every kind of vehicle used for transportation and conveyance and allowed for those uses on the highways of the Commonwealth.

The term "Tourist Court" shall mean a group of attached or detached buildings containing only individual sleeping rooms or living units, designed for temporary use by automobile tourists or transients; including auto courts, motels, or motor lodges and the like.

The term "Trailer Park" shall mean any camp, trailer, camp, trailer court, lot, parcel or tract of land designed, maintained or intended for the purpose of supplying a location or accommodation for two (2) or more trailers. "Trailer Park" shall not include automobile or trailer sales lots upon which unoccupied trailers are parked for the purpose of inspection or sale.

(e) *"Operator"*—Any person conducting the operation of a parking place and charging and collecting the consideration for the parking or storage of motor vehicles at such parking place including, without limiting

the generality of the above, any governmental body, governmental subdivision, municipal corporation, public authority, non-profit corporation, or any person so performing as an agent of any of the above.

(f) *"Patron"*—any natural person who drives a vehicle of his own or of another into and upon a non-residential parking place, as herein defined, for the purpose of having such vehicle parked or stored for any length of time.

(g) *"Person"*—any natural person, partnership, unincorporated association, or corporation, non-profit or otherwise. Whenever used in any provision prescribing a fine or penalty, the word "Person" as applied to partnerships, shall mean and include all of the partners thereof, as applied to unincorporated associations, shall mean and include all of the members thereof, and as applied to corporations, shall mean and include all officials thereof.

(h) *"School District"*—Moon Area School District.

(i) *"Transaction"*—The parking or storing on a unit per occurrence basis of a motor vehicle at a non-residential parking place, and such parking or storing on any other basis, and one consideration for the parking or storing.

(j) Pronoun references shall be read and construed as appropriate to the relevent circumstances.

SECTION 3. IMPOSITION AND PAYMENT OF TAX: For the period of April 25, 1979 to June 30, 1979, and thereafter on the fiscal year basis of from each July 1 to each following June 30, a tax for general revenue purposes is hereby levied upon each and every patron for each and every parking transaction at the rate of 15 per centum

(15%) on the consideration thereof. Every operator with each transaction shall add said tax to the consideration charged and shall obtain payment of said tax from the patron as a condition for the allowance of the parking or storing, and the fact of such allowance shall, and the fact of collection of the consideration shall conclusively presume the collection of the tax.

SECTION 4. *Parking Registration Certificates:*

(a) On or after the effective date of this Resolution, it shall be unlawful for any person and/or any operator to conduct, continue to conduct, or thereafter begin to conduct any parking transaction with reference to a non-residential parking place within the School District until or unless a Parking Registration Certificate or Certificates shall have been issued to said operator, and unless the tax imposed hereunder is accounted for in accordance with the provisions of this Resolution.

(b) Every person and/or operator desiring to continue to conduct or to begin to conduct any parking transaction, with reference to a non-residential parking place within the School District shall file annually an application for Parking Registration Certificate or Certificates for each parking place with the Collector. Every application for such Certificate or Certificates shall be made upon a form prescribed and furnished by the Collector, and authorized by the Board of School Directors of the School District. Such application shall set forth the name under which the applicant conducts such parking transactions, the location of the place of said parking place, the size and vehicle capacity of said parking place, and other such pertinent information as may be required by the Collector. If the applicant has or intends to have more than one place of such parking within the School District, the applicant shall state the required informa-

tion with respect to each and every such place of parking. If the applicant is other than an individual, the names and addresses of the principal officers thereof, and any other reasonable information required by the Collector, shall be stated in the application. The application shall be signed and sworn to by the applicant. The Collector may require that the application be verified by oath or affirmation.

(c) Upon a proper application being made, the Collector shall charge a registration and certificate fee of Ten Dollars ($10.00) annually for each certificate which shall be paid by the applicant and the Collector shall grant and issue to such applicant a Parking Registration Certificate for each place of non-residential parking as set forth in the application. A Parking Registration Certificate shall not be assignable and shall be valid only for the person and/or operator in whose name it is issued, and it shall be valid only for the conducting of non-residential parking at the place designated therein. Said Parking Registration Certificate shall at all times be conspicuously displayed at the place for which issued.

(d) The Collector may suspend, or after hearing, revoke a Parking Registration Certificate whenever the Collector finds that the holder thereof has failed to comply with any provision of this Resolution. Upon suspending or revoking any Parking Registration Certificate, the Collector shall request the holder thereof to surrender immediately all Parking Registration Certificates and duplicates thereof. Whenever the Collector suspends a Parking Registration Certificate, he shall notify the holder thereof immediately of such action and shall afford the holder a hearing, if one is desired and has not already been afforded. After such hearing, the Collector may either rescind his order of suspension, continue said

suspension, or revoke the Registration Certificate or Certificates.

SECTION 5. RECORDS:

(a) Each operator shall maintain, separately with respect to each parking place, complete and accurate records of all transactions, of the total amount of consideration received from all transactions, and the total amount of tax collected on the basis of such consideration, and the same shall be done on a uniform daily basis. Each operator shall issue to the person paying the consideration such written evidence of the transaction as the Collector may prescribe by regulations.

(b) As to all transactions otherwise than on a unit per occurrence basis, the Operator shall make, have and keep segregated records of all such transactions, or if oral, then do so by a record of relevant data as adequately describes each such transaction for calculation of the proper tax. Records shall be made at the time of the transactions. They shall be kept in chronological order.

(c) Each Operator shall afford the Collector and his designated agents and employees access to all such records and evidence at all reasonable times and shall provide verification of the same as the Collector may require. The Collector and his agents are hereby authorized at reasonable times and in reasonable manner to examine the books, papers and records of any operator in order to verify the accuracy of any return made.

(d) If no return has been made, or if a false return has been made, or if the operator's records are not properly made or kept, or if the operator of anyone under his control in any way obstructs an orderly audit or investigation relating to the determination of the proper tax due, then the Collector may make such assessment of

what he reasonably determines to be the proper tax due, and in addition to the penalty and interest thereon as may be due, may add a liquidated damages assessment of up to one hundred per centum (100%) of the proper tax, and any fine as may be imposed under Section 9 shall be in addition to the liabilities hereunder.

SECTION 6. RETURNS AND PAYMENTS: Each Operator in collecting the tax (under Section 3.) shall do so as the agent and trustee for the School District under the provisions and for the purposes hereof; and, on the form prescribed by the Collector, shall file with him by the 15th day of each month, returns on all transactions of the Operator in the preceding calendar month. With such filing the Operator shall pay to the Collector all taxes due hereunder for such preceding month, such "taxes due" being the full tax that the Operator was charged hereunder to obtain from his patrons less two per centum (2%) thereof as compensation to the Operator for his services. Every Operator who fails to comply with the provisions hereof shall be deemed to have acknowledged his intentional failure of consideration and of his voluntary surrender of such compensation.

SECTION 7. COLLECTOR'S POWERS AND DUTIES: The Collector, on behalf of the School District, shall receive and collect the taxes, interest, fines and penalties imposed hereunder and shall have the power, in the event that any Operator has, in the judgment of the Collector, failed to pay over the amount of the tax due, to collect the tax directly from the Patron and charge the cost of collection to the Operator, and shall maintain records showing the amounts received and the date such amounts were received. The Collector shall, with the approval of the Board of School Directors of the School District, adopt and enforce regulations relating to the

administration of this Resolution, such regulations including but not limited to those relating to evidence, records, forms, applications, registration certificates and returns.

SECTION 8. COLLECTION AND PENALTY AND INTEREST: All taxes, assessments, penalties and interests due from the Operators under this Resolution shall be paid to the Collector. Any Operator who fails to file a proper report as due or who fails to make proper payment as due, shall pay also a penalty of an additional ten per centum (10%) of the amount of the tax, and in addition, shall pay interest on the tax at the rate of one per centum (1%) per month or fraction thereof from the due date, the same being in addition to liabilities under Section 5(d) and Section 9.

SECTION 9. PENALTIES: Any person who violates any provision of this Resolution, or any regulation adopted pursuant to it shall, upon conviction thereof before any magistrate, be liable for a fine not to exceed more than Five Hundred Dollars ($500.00), or, in default thereof shall be imprisoned for a period not to exceed thirty (30) days. Each violation shall constitute a separate offense. Such penalties so imposed shall be in addition to all other liabilities otherwise imposed under any other of the provisions hereof, and shall be in addition to any other liability that may be applicable under any other provisions of law, civil, equity, and criminal.

SECTION 10. SEVERABILITY: The provisions of this Resolution are severable and if any of its provisions shall be held invalid or unconstitutional, such decision shall not effect or impair any of the remaining provisions of the Resolution. It is hereby declared to be the intention of the Board of School Directors of the School District that this Resolution would have been adopted if such

invalid or unconstitutional provision had not been included herein.

SECTION 11. REPEALER: Any Resolution or any part of any Resolution conflicting with the provisions of this Resolution is rescinded insofar as such conflict exists.

SECTION 12. EFFECTIVE DATE: This Resolution shall take effect April 25, 1979.

MOON AREA SCHOOL DISTRICT

By .....
President

ATTEST:

.....
Secretary

Adopted Mar. 26, 1979

Office-Supreme Court, U.S.
FILED
NOV 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-563

IN THE

Supreme Court of the United States

October Term, 1981

GRANT-OLIVER CORPORATION,
TRANS WORLD AIRLINES, INC., USAIR, INC., et al.,
Appellants

v.

MOON AREA SCHOOL DISTRICT,
Appellee

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

MOTION TO AFFIRM

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MOTION TO AFFIRM

The Appellees move that the judgment of the Pennsylvania Supreme Court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as to need no further argument.

QUESTIONS PRESENTED

I. WHETHER A TAX UPON PATRONS OF NON-RESIDENTIAL PARKING FACILITIES LOCATED WITHIN THE MOON AREA SCHOOL DISTRICT IS VALID BECAUSE IT DOES NOT VIOLATE THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION BY IMPOSING AN IMPERMISSABLE BURDEN ON THE RIGHT TO TRAVEL?

Answered in the affirmative by the Pennsylvania Supreme Court.

II. WHETHER THE TAX COMPLIES WITH THE COMMERCE CLAUSE AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE THE SCHOOL DISTRICT PROVIDES ADEQUATE BENEFITS TO NON-RESIDENT PATRONS WHO ARE ALMOST EXCLUSIVELY THE SUBJECT OF THE TAX.

Answered in the affirmative by the Pennsylvania Supreme Court.

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STATEMENT OF THE CASE

This appeal arises from a decision of the Pennsylvania Supreme Court which upheld the constitutional validity of a fifteen percent patron parking tax adopted by the Moon Area School District. The District, a duly constituted school district under the laws of the Commonwealth of Pennsylvania, enacted this tax pursuant to the Pennsylvania "Local Tax Enabling Act", Act Number 511 of 1965 and amendments thereto. Act 511 is a specific delegation of Legislative taxing authority which grants to local municipalities, including school districts, full taxing power as deliniated in Section 902 of the Act (53 Pa. C.S. §6902).

Specifically, Resolution 79-2 requires the operators of all non-residential parking facilities within the District to add the 15% tax to the consideration paid for parking. There are six non-residential parking operations in the District. The receipts from the tax are to be used solely for the School District's general revenue purpose. The tax is imposed upon all patrons of all non-residential parking facilities within the School District. This tax is on the purely local activity of parking of storing a car in the District. The parking facilities affected by the tax are used by patrons of commercial establishments located at the airport, individuals who are seeing passengers off or greeting passengers as they arrive at the airport, and passengers traveling in interstate and intrastate flights from the airport. The local patrons of the parking facilities can have no other tax imposed on them in any other state for this parking transaction.

The School District confers many benefits, both direct and indirect upon non-residents who enter the geographic confines of the District. The parking lots are

available in the District at the motorists pleasure and for his service and convenience. The District's many recreational facilities and parks are open to residents and non-residents alike and are often used by non-resident travelers staying at near-by motel facilities.

Concededly, a large percentage of the parking spaces are used by individuals utilizing the facilities at the Greater Pittsburgh International Airport. However, this is a local activity which occurs prior to any interstate travel which may or may not follow. An individual who is departing from the Airport has a number of options available to him. He may either take a bus, cab, limousine or be driven to the terminal; or he may drive his car and park in one of the concessions operated within the District. The lots in the District are merely an added convenience to the patrons.

The adoption of Resolution 79-2 was challenged by the Appellants herein and others who filed a statutory appeal from the tax on April 6, 1979, pursuant to §6906 of Pennsylvania's Local Tax Enabling Act, Act No. 511 of 1965, P.L. 1257, 53 Pa. C.S. §6901 et seq., in which they asserted the unconstitutionality of the tax.

The Court of Common Pleas of Allegheny County, Pennsylvania held that the tax was invalid as violative of the Commerce Clause and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

The School District appealed to the Commonwealth Court of Pennsylvania which affirmed the lower courts order by adopting as its own the opinion of the Court of Common Pleas.

The Pennsylvania Supreme Court, in a unanimous decision, reversed the lower court's holding and found that the tax did not violate the Commerce Clause or the

Due Process Clause of the U.S. Constitution. Appellants then filed with the Pennsylvania Supreme Court a notice of appeal to this court.

REASONS FOR GRANTING THE MOTION TO AFFIRM

I. A Tax Upon Patrons of Non-Residential Parking Facilities Located Within The Moon Area School District Does Not Violate the Commerce Clause of The United States Constitution by Imposing a Constitutionally Impermissable Burden on Interstate Commerce or on the Right to Travel.

Appellants, herein, contend that the School District Tax is a "head tax" which violates the Commerce Clause, Article 1, Sec. 8 of the United States Constitution, by placing an impermissable burden on the right to travel. In this situation, Congress has acted affirmatively when it expressly *prohibited* "head taxes" on persons traveling in air commerce and expressly *permitted* "sales or use taxes" on the sale of goods or services. Pub.L. 85-726, Title XI, §1113, as added, Pub.L. 93-94 §7(a), June 18, 1973, 87 Stat. 90, 49 U.S.C.A. §1513.

The Pennsylvania Supreme Court has construed this tax to be "a sales and use tax":

> "A head tax is a tax reckoned at a fixed amount for each head (person) in a designated class. The tax here is not on the heads of persons traveling in air commerce or on the carriage of persons traveling in air commerce. The operating incidence of the tax is the transaction of parking in non-residential parking lots in the School District which are located at or near the Pittsburgh International Airport. The tax is borne by the patrons of the parking operations. The

measure of the tax is the consideration paid for the parking transaction. It is not a tax on the right to travel and clearly Congress has not prohibited such a tax under 49 U.S.C.A. 1513". *James E. Tricco, James A. Davis, et al. vs. Moon Area School District*, Pa., 446 A.2d 234 (1982). (App.13a)[1].

The Supreme Court of the United States is bound by the construction given by the highest State Court to a statute or local ordinance of that state. *New York vs. Ferber*, 50 U.S.L.W. 5077 (U.S. July 2, 1982) (No. 81-55), *Shuttlesworth vs. City of Birmingham*, 86 S.C. 211 (1965).

Because the Pennsylvania Supreme Court has construed the tax to be a "sales and use tax" and not a "head tax" on the right to travel, this Court is bound by that determination. The question remains, however, whether this sales and use tax is violative of the negative implications of the Commerce Clause. The Pennsylvania Supreme Court has held that it is not. *James E. Tricco, et al., supra.* (App. 17a).

In reviewing a Commerce Clause challenge to a local tax, the focus is upon the practical effect of the tax to determine whether the tax substantially affects or is connected with interstate commerce. *Commonwealth Edison Co. vs. Montana*, 453 U.S. 609 (1982).

Interstate Commerce is not immune, however, from state taxation.[2] State taxes levied on interstate commerce are not per se invalid. *Commonwealth Edison Co.*

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1. "App". references are to Appendix A of the Appellant's Jurisdictional Statement.

2. *Western Livestock Bureau vs. Bureau of Revenue*, 303 U.S. 250, 254 (1938).

vs. Montana, supra; Washington Revenue Dept. vs. Assoc. of Washington Stevedoring Co., 435 U.S. 734 (1978), *Complete Auto Transit, Inc. vs. Brady*, 430 U.S. 274 (1977).

The Pennsylvania Supreme Court found that the tax in question is a part of the flow of or is connected with interstate commerce. The Court upheld the tax, however, holding that the Moon Area School District Tax fully complied with the requirements of *Complete Auto Transit, supra.*

The test of *Complete Auto Transit* and *Wash. Rev. Dept.* now controls the question of a direct tax on the privilege of engaging in interstate commerce and any tax that is challenged under the Commerce Clause.[3] The test is a four-fold one:[4]

1. Is the tax applied to an activity with a substantial nexus to the taxing state?
2. Is the tax fairly apportioned?
3. Does the tax discriminate against interstate commerce?
4. Is the tax fairly related to the services provided by the taxing body?

There is without any doubt a substantial nexus to the taxing body or state since all of the parking lots subject to the tax are located entirely within the taxing District.

With regard to the apportionement and discrimination aspects of the four-prong test, an examination of the

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3. *Merrion et al., DBA Merrion & Bayless, et al. v. Jicarella Apache Tribe, et al.*, 50 U.S.L.W. 4169 (U.S. January 25, 1982) (No. 80-11).

4. *Complete Auto Transit, supra*, at 279; *Wash. Rev. Dept., supra*, at 747.

recent case of *Budget Rent-A-Car vs. Multnomah County*, 287 OR. 93, 597 P.2d 1232 (1979) is extremely helpful. Budget presents a remarkably similar fact situation to the present tax. In fact, the local resolutions themselves are very similar. Therein, a county imposed on every person who rented a motor vehicle, a 10% tax on the gross rental value to be collected by the provider of the rented vehicle. A unanimouns Supreme Court of Oregon sustained the tax against a Commerce Clause challenge. The facts indicated that approximately 75% of automobile rentals in Multnomah County take place at the Portland International Airport, *mostly by non-residents engaged in interstate travel.* ID. at 1236 (emphasis added).

The Oregon Supreme Court then quoted from the three United States Supreme Court cases which undoubtedly comprise the modern approach to Commerce Clause analysis of the state taxation questions. *Western Livestock vs. Bureau, supra; Complete Auto Transit, Inc. vs. Brady, supra; Wash. Dept. of Rev. vs. Assoc. of Stevedores, supra.* Applying these principles, the court held that this tax was constitutional and should be upheld.

The Supreme Court of Oregon recognized that of the four categories listed in *Complete* and *Wash. Rev.*, the two which presented the most serious problems are apportionment and discrimination. *Budget, supra* at 1239. The tax on automobile rentals, just as the tax in the School District in the present case, was not apportioned. The purpose of apportionment "... is not to segregate interstate from intrastate commerce in order to immunize the latter but only to avoid taxation by more than one state." ID at 1240. If there is no danger of multiple taxation then there is no need for apportionment. Since the act of parking at a non-residential lot in the School

District is the legal incidence of the tax, and it can occur in no other place, no other locatility or state could tax the act of parking. The Moon Township Gross Receipt parking tax is on the incidence of doing business measured by gross receipts, and can not support a claim of multiple taxation. *James E. Tricco, et al., supra.* (App. 15a).

The claim that the tax discriminates against interstate commerce is equally without merit. In *Budget*, supra, the Supreme Court of Oregon stated that discrimination "... implies a comparison, an objection not to some burdensome impostition as such but to differential treatment where such treatment is constitutionally forbidden." ID. at 1240. The School District tax applies to all non-residential parking spaces in the district and the rental tax in Multnomah County applied to all rentals in the county. Equaltiy of treatment was achieved.[5] The tax burden in the School District is borne according to the extent of use of the parking facilities and not on a distinction between patrons using interstate air commerce and patrons engaged in intrastate or local commerce.

Thus, under the foregoing analysis, it is evident that the parking tax in question satisfies the first three prongs of the *Complete Auto* test. The appellee, herein, strongly urges this court to recognize how *Complete Auto* and *Wash Rev.* were applied in the similar fact situation of *Budget Rent-A-Car* noted above, and that courts analysis of the four-prong test.

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5. "... Equality is its aim. It does not aim at or discriminate against interstate commerce. It is laid upon every purchaser within the state, regardless of the relation with interstate commerce." See *McGoldrick v. Berwind-White Co.*, 309 U.S. 33, 49 (1937).

The Appellant's most stringent challenge to the School District Tax is under the fourth prong of the *Complete Auto* and *Wash. Rev.* tests namely, whether the tax is fairly related to the services or benefits provided by the state. Appellants contend that the District provides no benefits in exchange for the tax, and as such the tax violates the Commerce Clause and the Due Process Clause of the United States Constitution. The "benefits test" is applicable to both the Commerce Clause and Due Process analysis involving a local tax, and as such it will be fully elaborated upon in the next section of this argument. As will be shown, the parking tax in question satisfies the fourth prong of the *Complete Auto test* because the tax is fairly related to the services or benefits provided by the School District.

From the above, it is clear that the present tax is not vulnerable to a Commerce Clause challenge and, therefore, the Pennsylvania Supreme Court's holding on this issue must be affirmed.

II. The Parking Tax in Question Does Not Violate the Commerce Clause or the Due Process Clause of The United States Constitution Because the Taxing School District Provides Numerous Benefits to Non-Resident Patrons Traveling in Interstate Commerce.

The Pennsylvania Supreme Court held that the instant tax did not violate the Commerce Clause or the Due Process Clause of the U.S. Constitution because the School District provided adequate benefits to the taxpayers in exchange for the tax. *James E. Tricco, et al., supra*, (App. 20a).

It is important in the area of this analysis to recognize that pursuant to the local Tax Exabling Act, 53 PA. C.S. §6901, supra, the Commonwealth of Pennsylvania

has delegated to the School District, its power and authority to tax. Therefore, the District, in duly enacting Resolution 79-2, is merely acting pursuant to this delegated authority.

In reviewing a "benefits" analysis of a local tax to determine its constitutionality, undeniably, *Wisconsin v. J.C. Penney*, 311 U.S. 345 (1940) is the controlling prescedent. The test as set out in *J.C. Penney* is as follows:

> "A state is free to pursue it's fiscal policies, unembarrassed by the Constitution, if by the practical operation of the tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an *orderly, civilized society.*"
>
> "The simple but controlling question is whether the state has given anything for which it can ask in return. The substantial privilege of carrying on business in Wisconsin which has been given, clearly supports the tax . . . " *ID* 444-445.

Thus, it is clear from the above case, all that is required in order to levy a state or local tax is some minimal contact with the state or subdivision or some "nexus" such as doing all or part of a business or transaction within the geographical confines of the taxing body. This minimal contact is all that is required to avoid scrutiny and invalidation as arbitrary or capricious under the Due Process Clause.

The instant School District affords non-residents the right to do business or park their vehicles within the

District which is all that is required as per the bench mark decision of *J.C. Penney.*

Further, in *Carmichael vs. Southern Coal & Coke Co.*, 301 U.S. 495, 522 (1937) this Court stated that:

"... The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the *privilege of living in an organized society*, established and safeguarded by the devotion of taxes to public purposes. *Id at 522.* (emphasis added)[6].

Appellants would have this court believe that a direct and concrete benefit or quid pro quo be conferred upon non-residents in return for the right to tax that non-resident's activities which take place within the taxing district. This simply is not and has never been the test. *J.C. Penney* and *Carmichael Coke* absolutely refute Appellant's line of reasoning.

There have been numerous cases which have subsequently cited, with approval, the simple test announced in *J.C. Penney* and *Carmichael Coke—Commonwealth Edison Co. vs. Montana*, supra; *Standard Press Steel vs. Washington*, 419 U.S. 560 (1974); *General Motors Corp. vs. Washington*, 337 U.S. 436 (1964); *Nelson vs. Sears Roebuck Co.*, 312 U.S. 359 (1940). Everyone of these opinions listed above detail this simple "benefits-burden" theory, namely, whether the taxing body has given anything to promote an orderly society for which it can, in return, impose a tax.

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6. The fourth prong of the four part test of *Complete Auto* for Commerce Clause scrutiny of a state tax, as refined in *Commonwealth Edison vs. Montana*, supra at 625 n.14, 18, is derivitive of *Carmichael v. Southern Coal & Coke*, supra, and *J.C. Penney, supra.* See *James E. Tricco, et al.* at 243, N.15.

The benefits provided by the School District are numerous. Public education is a benefit of an organized society. Non-resident patrons and operators of the parking facilities are benefitted by the activity of transacting business in the District. Non-resident patrons of the parking facilities are benefitted because the parking lots provide easy access to the Airport and surrounding commercial establishments and hotels. The School District also provides recreational facilities and parks available to non-residents and residents alike. The services, facilities and conveniences provided by the School District are more than sufficient benefits to non-residents to constitute the necessary *general benefit of living in an orderly and civilized society.* Because the School District provides valuable benefits to non-residents in exchange for the tax imposed, the challenge to the tax under a Due Process theory must fail.

From the above, it is clear that there is no Due Process violation. Also, the fourth prong of the *Complete Auto Transit* test is satisfied. Consequently, the Pennsylvania Supreme Court's holding that the tax in question does not violate either the Commerce Clause or the Due Process Clause of the U.S. Constitution must, therefore, be in all respects affirmed.

CONCLUSION

For the foregoing reasons, the Judgment of the Pennsylvania Supreme Court should be in all respects affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing Motion to Affirm has been made on this 22nd day of November, 1982 by delivering three copies thereof to the offices of the following attorneys, who are counsel for all parties to be served:

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No. 82-563

IN THE

Supreme Court of the United States

October Term, 1981

GRANT-OLIVER CORPORATION,
TRANS WORLD AIRLINES, INC., USAIR, INC., et al.,
Appellants

v.

MOON AREA SCHOOL DISTRICT,
Appellee

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

MEMORANDUM IN OPPOSITION TO MOTION TO AFFIRM

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MEMORANDUM IN OPPOSITION TO MOTION TO AFFIRM

The Appellee School District argues that its patron parking tax does not discriminate against interstate travel and does not impose a constitutionally impermissible burden on the right to travel because: (1) it "applies to all non-residential parking spaces in the [school] district"; (2) it "is borne according to the extent of the use of the parking facilities"; and (3) it does not distinguish between patrons using interstate air commerce and patrons engaged in interstate or local commerce. (Mot. p. 7.)*

In fact, however, the tax is aimed at and falls almost exclusively on non-residents of the School District who are traveling in interstate commerce and impermissibly discriminates against those engaging in interstate commerce.

The tax is imposed on patrons of commercial parking lots located in the School District. As the Pennsylvania Supreme Court stated, "The record here indicates that the vast majority of patrons of the parking lots are traveling in air commerce. . . . The conclusion that the parking activity is a part of the flow of or connected with interstate commerce is inescapable." (App. 15a.)

The trial court found that "the patrons subject to the tax are overwhelmingly engaged in interstate commerce and are non-residents of the District. The District provides *no services or facilities* for the non-resident interstate travelers because there are none available." (Emphasis added) (App. 43a.) Thus, the Appellee's tax is

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*"Mot." references are to the Motion to Affirm. "App." references are to the Appendix to the Jurisdictional Statement.

unlike the tax sustained in the case principally relied on by the School District, *Budget-Rent-A-Car of Wash. v. Multnomah Cty.*, 287 Or. 93, 597 P. 2d 1232 (1979). In *Budget*, the tax was imposed by a governmental entity, a county, which provided benefits and protection to those who were subject to the tax—here the School District provides none. Further, the court in *Budget* stated that it would not have sustained the tax if, as here, "the actual incidence of the tax on local users were only episodic and trivial."

The Appellee's tax falls almost exclusively on persons traveling in interstate commerce. It is not imposed for the purpose of making those travelers bear a fair share of the cost of providing public facilities that further such travel. It impermissibly discriminates against those traveling in interstate commerce and is therefore unconstitutional.

Respectfully submitted,

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